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One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights through the Free Trade Area of the Americas

Owen Lippert*

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INTRODUCTION

Negotiating free trade agreements is the political equivalent of a trip to the dentist. Changing intellectual property laws is dental work without anesthesia. It takes a great deal of persuasion for any country to make a single change, let alone a multitude of changes. Based on my experiences in 1997 and 1998, a stronger case needs to be made for negotiating a high and consistent level of protection for intellectual property rights in the Free Trade Area of the Americas ("FTAA").[1] This Article represents an attempt to make such a case to an informed and interested general audience.

In 1997 and 1998, I attended the Business Forum sessions, which have met just before the annual hemispheric trade ministers' summit to discuss the progress towards FTAA negotiations. The forums were held respectively in Belo Horizonte, Brazil,[2] and San Jose, Costa Rica.[3] I participated in the sessions of the Working Group on Intellectual Property.[4] Watching the discussions would have led anyone to suspect that the intellectual property rights

1. The Heads of State of thirty-four democracies in the Western Hemisphere at the Summit of the Americas agreed to construct a "Free Trade of the Americas " ("FTAA") in an effort to eliminate tariff and non-tariff barriers in the region. The resolution to construct the FTAA was a result of the Summit of the Americas' desire to eliminate barriers to trade and investment and advance economic integration and free trade. *See* Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808 (1995).

2. Third Trade Ministerial and Business Forum of the Americas, Belo Horizonte, Brazil, May 13-16, 1998.

3. Fourth Trade Ministerial and Americas Business Forum, San Jose, Costa Rica, Mar. 16-19, 1998.

4. The Working Group on Intellectual Property Rights, one of the 12 FTAA Working Groups established by the Trade Ministers was created at the March 1996 ministerial in Cartagena, Columbia.

("IPR") to be negotiated in the FTAA might not advance beyond the current international standard found in the 1994 agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"),[5] negotiated during the Uruguay Round of trade talks establishing the World Trade Organization ("WTO").[6]

I argued as much in an article for the America's Column of the *Wall Street Journal* under the demure headline, "Pirates Plunder Patents. Will the Rule of Law Prevail?"[7] In response to the piece, James Packard Love[8] and I have had several public and private debates. Mr. Love works for Ralph Nader[9] at the Center for Study of Responsive Law,[10] and had also attended the Business Forum sessions.[11] Mr. Love supports the use of patents in developed countries; but, at the same time, he suggests that they could be optional for developing countries. To that end, Mr. Love has proposed forms of compulsory licensing[12] in which the effects would be offset by a scheme to replicate the incentive-to-invent with government subsidies for research and development.[13]

Our debate has mirrored the ongoing North-South discussion on IPR and trade.[14] The existence of our debate raises the question

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5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

6. The Uruguay Round of Multilateral Trade Negotiations established the WTO. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Uruguay Round"), Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

7. *See* Owen Lippert, *Pirates Plunder Patents. Will the Rule of Law Prevail?*, WALL ST. J., Apr. 17, 1998, at A15.

8. James Packard Love is a economist lawyer working at the Center for Study of Responsive Law ("CSRL") in Washington, D.C.

9. Ralph Nader is a leading consumer advocate and the founder of several organizations, including the CSRL.

10. The CSRL was created by Ralph Nader in 1968 as an independent research and advocacy organization that advances the interests of consumers and citizens on a wide range of topics. The CSRL is based in Washington, D.C.

11. *See* Lippert, *supra* note 7.

12. *See* James Packard Love, *A Free Trade Area For the Americas: A Consumer Perspective on Proposals As They Relate To Rules Regarding Intellectual Property*, (visited Oct. 10, 1998) <http://www.cptech.org./pharm/belopaper.html>. This piece includes comments presented for the Working Group on Intellectual Property Rights at the Third Ministerial and Americas Business Forum, Belo Horizonte, Brazil.

13. *See id.*

14. For a discussion of the North-South Debate, *see* Carlos A. Primo Braga, *The*

that if the benefits of stronger IPR are so self-evident, why does it take international treaties to prod developing nations into compliance? The question can be restated in the context of the current thirty-four nation effort to negotiate IPR in the FTAA.[15] Are American trade negotiators acting largely for the benefit of the American pharmaceutical, software, and entertainment industries and are they using the FTAA to advance, in a more manageable regional forum, those IPR standards which were not secured in TRIPs? Are they seeking an accelerated implementation of TRIPs and possibly a TRIPs Plus in key hemispheric markets? If so, is this a desirable strategy for either or both the United States and the developing Latin American countries?

These questions arise against a background of persistent academic skepticism as to the wisdom of negotiating IPR standards in multilateral trade negotiations.[16] Reflective of that analysis is a 1993 article by J.H. Reichman, which he refutes the following three propositions that, underlie the effort of developed nations to strengthen IPR in multilateral negotiations.[17] First, "[s]trong intellectual property rights exert an unreservedly positive influence on developed free-market economies."[18] Second, "[s]trong intellectual property rights benefit all countries regardless of their present stage of development."[19] Last, "[t]he acquisition of non-indigenous technologies by developing countries other than by imports or license usually constitutes an illicit economic loss to the technology exporting countries."[20]

Reichman dismisses the first two propositions as "counter-intuitive and neither historical experience nor the literature support

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Economics of Intellectual Property Rights and the GATT: A View from the South, 22 VAND. J. TRANSNAT'L L. 243 (1989).

15. *See supra* note 1 and accompanying text.

16. For articles laying out some of these concerns, *see* Keith E. Maskus, & M. Penubarti, *How Trade-Related are Intellectual Property Rights?* 39 J. INT'L. ECON. 227-48 (1995); *see also* Alan V. Deardoff, *Should Patent Protection Be Extended to All Developing Countries*, 13 WORLD ECON. 497-521 (1990).

17. *See* J.H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171, 173 (1993).

18. *Id.* at 173.

19. *Id.*

20. *Id.*

them."[21] Though he concedes that countries with established IPR regimes are better off with them,[22] Reichman questions whether stronger regimes are necessarily more efficient than weaker ones.[23] He describes the third proposition as "this residual mercantilist attitude [which] conflicts with the underlying competitive ethos from which intellectual property rights derogate and with the territorial nature of these derogations."[24] Under this view, the negotiation of IPR in the FTAA is just another exercise of raw economic power rather than a principled step towards an optimal regime. As in the Uruguay Round, where trade access to developed nation markets was horse-traded for the developing world's agreement to TRIPs, the FTAA round proposes a similar deal in which the elimination of hemispheric tariffs will be exchanged for a regional "TRIPs Plus."

In response to Mr. Love, Professor Reichman, and others, this Article seeks to answer the following three questions.

(1) Should a higher than TRIPs standard of IPR protection be negotiated in the FTAA?

(2) If higher than TRIPs protection should be negotiated in the FTAA, what should be the level and scope?

(3) What specific enforcement mechanisms should be negotiated in the FTAA to ensure effective protection?

This Article proposes that the FTAA should negotiate a higher and clearer level of intellectual property protection than TRIPs. Part I analyzes the benefits and challenges of a higher standard of IPR protection for the FTAA. Part II discusses the scope of an expanded IPR protection under the FTAA. Part III reviews the specific enforcement mechanisms to ensure effective protection under the FTAA. This Article concludes that an expanded IPR standard under the FTAA should be adopted and modeled after North American Free Trade Agreement.

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21. *Id.* at 174.

22. *See generally* Reichman, *supra* note 17 (discussing the benefits afforded countries with established IPR regimes).

23. *Id.*

24. *Id.* at 175.

I. SHOULD A HIGHER THAN TRIPS STANDARD OF IPR PROTECTION BE NEGOTIATED IN THE FTAA?

A. *Strengthening IPR offers Long Term Gain*

I present the case that strengthening IPR creates only transitional losses for developing countries while providing long-term gains.[25] The economic and social benefits, however, lie as much in strengthening property rights in general as in any specific new investment and technology transfer. While empirical research can show the balance of economic gains and losses, other benefits, primarily the entrenching of the "rule of law," are not so easily "proven," though potentially more effective in stimulating sustainable economic growth. The long-term economic and social value of those benefits, not clearly susceptible to empirical measurement, outweigh the "losses" incurred either by restrictions on copying or by the granting of so-called "monopoly" privileges.

1. Empirical Debate over the Effect of IPR Standards

Conventional economic analysis of the effects of patents and other IPR has tried to compare the social or total benefits of increased incentives for innovation against the social cost of the so-called monopoly right. Various efforts have been made to postulate empirical measures with which to validate the respective claims of net social loss or benefit.[26]

The standard "empirical" case against strengthening IPR in developing countries stems from the observation that the short-term losses cannot help but outweigh the long-term gains because such IPR laws' would forbid the relatively easy and cheap copying of

25. *See* Julia Cheng, Note, *China's Copyright System: Rising to the Spirit of TRIPs Requires An Internal Focus and WTO Membership*, 21 FORDHAM INT'L. L.J. 1941, 1982 (1998) (briefly discussing short-run economic disincentives to intellectual property law enforcement in China). *See also* Marie Wilson, *TRIPs Agreement Implications For ASEAN Protection of Computer Technology*, 4 ANN. SURV. INT'L & COMP. L. 18, 22-23 (1997) (explaining that enforcement of intellectual property laws "offer[s] long-term benefits of enhanced employment, economic development, and innovation").

26. *See generally*, Harvey E. Bale, Jr., *Patent Protection and Pharmaceutical Innovation*, 29 N.Y.U. J. INT'L L. & POL. 95 (1997)(discussing debate over patent protection).

foreign patented goods.[27] Unable to produce these goods, in particular pharmaceutical drugs, developing countries would face an immediate and insurmountable loss to the welfare of domestic consumers.[28] Further, developing countries would be denied the opportunity to develop their economies through a growth-through-imitation stage such as characterized post-World War II Japan.[29]

By this view, the immediate costs of stronger IPRs, including higher administrative and enforcement expenses, larger royalty payments, potential price increases in patented products, and the restriction of "pirate" producers, overwhelm any gains from the resulting stronger incentive-to-invent which, at any rate, would be concentrated in the already developed world.[30] This case has been cast as so obviously empirically valid that relatively little research was conducted to verify it.

In the last twenty years, however, numerous studies have sought to measure the effect of changes in IPR standards on such items as economic growth, foreign direct investment ("FDI"), technology transfer, and consumer welfare.[31] Special mention must go to the pioneering work of Edwin E. Mansfield of the University of Pennsylvania.[32] The literature to 1990 was ably reviewed by

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27. *See generally* Carlos A. Primo Braga, *The Developing Country Case For and Against Intellectual Property Protection, in* STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES: A SURVEY OF THE LITERATURE (Wolfgang Siebeck ed. 1990) (discussing the effect on developing countries of strengthened IPR protection) ; *see also* the interesting discussion by Arvind Subramanian, *TRIPs and the Paradigm of the GATT: A Tropical, Temperate View*, 13 WORLD ECON. 509-21 (1990).

28. *See, e.g.*, JUDITH C. CHIN & GENE M. GROSSMAN, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE: ESSAYS IN HONOR OF ROBERT BALDWIN (R.W. Jones & A.O. Krueger eds., Basil Blackwell 1990) (discussing effects of international trade); *see also* GENE GROSSMAN & E. HELPMAN, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY (MIT Press 1991)(examining international trade); MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE (Routledge 1995) (discussing regulation of international trade).

29. *See* Lester C. Thurow, *Needed: A New System of Intellectual Property Rights*, 75 HARV. BUS. REV. 5, 94-103 (1997) (supporting the view for the need for growth through imitation).

30. *See* Reichman, *supra* note 17, at 174.

31. *See* Carlos A. Primo Braga, *Guidance from Economic Theory, in* WORLD BANK DISCUSSION PAPERS (1990); Robert E. Evenson, *Survey of Empirical Studies, in* WORLD BANK DISCUSSION PAPERS (1990).

32. *See* Evenson, *supra* note 31.

Robert E. Evenson and Carlos A. Primo Braga in a World Bank study.[33] It is fair to say that the results up to that time were tentative in their findings.

However, newer studies have begun to demonstrate a consistent positive correlation between stronger IPR and desirable effects in each of these areas.[34] More fine-grained studies have even shown a relationship between the quality of IPR offered in developing countries and the specific types of investment undertaken by multinational corporations ("MNEs").[35]

Even in the flash point debate over the cost of stronger patent protection for pharmaceutical drugs, new evidence suggests that earlier concerns may have been somewhat exaggerated. Canada provides an instructive example.[36]

In 1993 in preparation for the signing of the North American Free Trade Agreement ("NAFTA"),[37] Canada upgraded its intellectual property laws. Specifically, the new law, known popularly as Bill C-91, ended the practice of compulsory licensing of pat-

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33. *Id.*; *see also* Richard T. Rapp et al., *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. WORLD TRADE 75, 77-90 (1990) (discussing costs and benefits of intellectual property protection in developing countries); *see also* ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 191-99 (Westview Press 1990) (examining the relationship between economic development and intellectual property).

34. For correlations between IPRs and economic growth, *see* Walter G. Park & Juan Carlos Ginarte, *Intellectual Property Rights and Economic Growth*, 15 CONTEMP. ECON. POL'Y 51-61 (1997); *see also* Johan Torstensson, *Property Rights and Economic Growth: An Empirical Study*, 47 KYKLOS 2, 231-247 (1994); *see also* Jeffrey D. Sachs & Andrew M. Warner, *Economic Reform and the Process of Global Integration*, BROOKINGS PAPERS ON ECON. ACTIVITY, 1, 1-95z (1995). For correlations between IPRs and technology transfer and FDI *see* Edwin E. Mansfield, *Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer*, INT'L FIN. CORP. DISCUSSION PAPERS 19 (Int'l Fin. Corp. 1994) and *Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer: Germany, Japan and the United States*, INT'L FIN. CORP. DISCUSSION PAPERS 27 (Int'l Fin. Corp. 1995).

35. *See* Robert Sherwood, *Intellectual Property in the Western Hemisphere*, 28 INTER AM. L. REV. 3, 565 (1997).

36. *See* Owen Lippert, Dr. Bill McArthur & Cynthia Ramsay, *A Submission Prepared by The Fraser Institute For the House of Commons Industry Committee Concerning Bill C-91 (A Bill to Amend The Patent Act)*, (visited Oct. 10, 1998) <http://www.fraserinstitute.ca>.

37. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 605 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

ented pharmaceutical drugs developed by foreign drug companies.[38] The fear at the time was that these companies would exploit their "monopoly" position and force up the price of patented drugs.[39] Yet, ever since 1993, the average price of patented drugs has increased below the rate of inflation. For the last two years, prices have dropped by an average annual rate of two percent.[40] In Canada, the difference between the prices of patented and generic drugs is now about twenty percent.[41] Though the claim is made that the Patented Medicine Prices Review Board, set up by Bill C-91 to monitor drug prices and, if necessary, to roll them back, has contributed to price restraint, the actual number and scope of the PMPRB interventions have been modest.[42] Of more importance, one could claim, has been the consistently competitive nature of the pharmaceutical drug market in Canada over which the PMPRB has no mandate to regulate. In 1993, there were forty-five drug companies in Canada providing therapeutic-class drugs. The largest held an eight percent market share.[43] The same is true today.[44] Canada's experience of relatively benign effects of increased patent production on the prices of pharmaceutical drugs is not unique, at least according to a major new study of nine post-IPR reform countries in the developing world by conducted by Richard P. Ro-

38. *See* Patent Act Amendment Act of 1992, S.C., ch. 2, § 3 (1993) (Can.).

39. *See Debate Rages in Parliament Over Drug-Patent Legislation*, BNA PAT., TR., & COPYR. L. DAILY, Jan. 6, 1993, at 3. Also *see* Greg Ip, *State Intervention, Canadian-Style: There's a right way and Wrong Way to Guide Markets*, THE FINANCIAL POST, Dec. 31, 1994, at 39 (discussing positive effects of patent, including Canadian pharmaceutical companies increase in research and development of new products and emphasis on export.)

40. Patented drug prices decreased by approximately 2 percent in 1995. *See* Barrie McKenna, *Ottawa seeks Prescription for Drug Patent Battle*, GLOBE AND MAIL, Feb. 17, 1997, at B4.

41. *See* Bill MacArthur e-mail of Nov. 26, 1998 (on file with the *Journal*).

42. *See* Michael B. Moore, *"Open Wide" (Your Pocketbook That Is!) – A Call for the Establishment in the United States of a Prescription Drug Price Regulatory Agency*, 1 SW. J.L. & TRADE AM. 149, 151 (1994) (arguing that federal regulation in Canada has held "drug price inflation below the general inflation rate"). For the actual listing of interventions and annual reports, *see* the PMPRB website at Prices Medicine Prices Review Board (visited Feb. 22, 1999) <http://www.pmprb-cepmb.gc.ca>.

43. *See IMS Canada Reports New Treatments Push Canadian Pharmaceutical Sales Up 10% Over 1997*, Canada Newswire, Mar. 17, 1998, *available in* WESTLAW, 3/17/98 CANWIRE 20:10:00.

44. *See id.*

zek and Ruth Berkowitz.[45]

Does this mean the empirical argument has been decided in favor of higher IPR? Not yet. On the whole, George Priest's words still ring true, "in the current state of knowledge, economists know almost nothing about the effects on social welfare of the patent system or of other systems of intellectual property."[46]

2. The Theoretical Debate over Stronger IPRs

Beyond the empirical results lies a theoretical debate as to whether weaker IPR benefits developing countries and stronger ones harm them.[47] At the core of the debate lies the question of whether IPR are a true individually-held property right or a monopoly granted by the state to encourage innovation. If the former, then improvements in IPR protection is presumably desirable, whatever the empirical results as to social costs. If the latter, then any change to IPR protections should be subject to some welfare test.

Much speculation has focused on why implementing stronger IPR protections in developing countries would fail a welfare test. Such reasons include the losses from (1) an inability to copy patented products cheaply and easily, (2) the lack of access to the latest technology and the subsequent dependency of developing countries on developed ones, and, more recently, (3) the creation of market abuses by companies' holding monopoly patents. After discussing the core issue of the identity of IPR, this Article addresses these three theories, based on a social welfare analysis, ranged against stronger IPR protection.

45. *See* Richard P. Rozek & Ruth Berkowitz, *The Effects of Patent Protection on the Prices of Pharmaceutical Products: Is Intellectual Property Protection Raising the Drug Bill in Developing Countries?*, 1 J. WORLD INTELL. PROP. 2, 179-243 (1998).

46. George L. Priest, *What Economists can Tell Lawyers about Intellectual Property*, *in* 8 RESEARCH IN LAW AND ECONOMICS, THE ECONOMICS OF PATENTS AND COPYRIGHTS 21 (John Palmer ed., 1986)

47. *See* A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831 (1987).

a. Are Intellectual Property Rights subject to the Law or Monopoly Privileges subject to Competition Policy?

The debate over the nature of IPRs, and patents in particular, traces back to the very first patent. When the city fathers of Florence granted the patent No. 1 to Filippo Brunelleschi, who had invented a loading crane for ships, their economic self-interest, not any sense of property rights, guided them.[48] The preamble to this first patent bluntly states: "he refuses to make such machine available to the public, in order that the fruit of his genius and skill may not be reaped by another without his will and consent; and that, if he enjoyed some prerogative concerning this, he would open up what he is hiding, and would disclose it to all."[49] From this perspective, patents would appear as a regulatory form of monopoly created to serve the "instrumentalist" end of encouraging inventors to invent.[50]

Yet, if for the rulers of Florence and Venice and shortly thereafter the German and Dutch trade cities, the granting of a patent was simply a calculation of costs and benefits, for Brunellschi, and inventive individuals who followed him. It was a revolution in their economic and legal relationship to both the state and the broader business community. They held a property right, if only temporarily protected, to the relatively exclusive use and control of the physical and practical forms derived from their unique insights into the possibilities of matter. What they owned the state could not seize nor competitors steal. Thus from its beginning the patent embodied, in the words of Michael P. Ryan, "the philosophical tension between *natural property rights* and *public welfare–enhancing incentives for risky investment.*"[51]

48. BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 17 (Public Affairs Press 1967).

49. *Id.*

50. *See* A. Samuel Oddi, *TRIPs—Natural Rights and a 'Polite Form of Economic Imperialism'*, 29 VAND. J. TRANSNAT'L L. 415 (1996) (discussing the concept of natural rights in patent law).

51. MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 7 (Brookings Inst. Press 1998).

One could, indeed, write the history of patent law as the shifting balance as to the relative value of personal property rights versus a mere incentive for innovation and investment. Deputies of the National Assembly during the French Revolution asserted that an inventor's property right in his or her discovery represented one of the "rights of man." They desired in part to restrict the state and the aristocrats who controlled it from exploiting productive and innovative members of the bourgeoisie. In contrast, Thomas Jefferson, worried less about aristocrats and more about the social value of proprietary knowledge, wrote Article I, section 8 of the Constitution to establish patents for strictly utilitarian purposes; in his words, "to promote the progress of Science and the useful Arts."[52]

One might even conclude that personal interests will forever determine the debate. On the one side, inventors and their lawyers insist that intellectual property rights are about preventing theft. On the other politicians and economic planners assert that patent "law" concerns the balance between industrial incentives and the diffusion of useful knowledge. Yet, there are three reasons to choose the property rights side in this debate: convention, the evolutionary nature of rights, and capitalism's revealing of the value of IPRs as rights.

i. Convention

Convention, too often, is underrated when compared to supposedly objective analysis. It is convention that gives patent the legal form of a property right and determines its specific length. Economists did not determine that the socially optimal length of a patent should be twenty years; indeed, there are probably too many uncertainties ever to decide such a question. One could say that patents are not actually at all about the duration of an intellectual property right, but rather for how long the state is willing to defend it on behalf of the inventor.

52. U.S. CONST. art. I, § 8, cl. 8. The United States Constitution grants Congress the power to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries." *Id. See also* Tom Bethell, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 262 (St. Martin's Press 1998).

A maddening feature of convention is that history provides few straight answers as to why patents evolve from something close to blackmail in Renaissance Florence to a right defined and protected by the common law in the modern Anglo-American tradition. Still, convention, though malleable, deserves respect even if its underlying logic may appear elusive.[53]

There is also the possibility that convention generates its own strong economic efficiency argument for IPR as rights.[54] That argument is the same as the efficiency argument for the common law made by such scholars as Richard Posner, William Landes, and Richard Epstein.[55] They contend that, for reasons of historic accident and particular human ingenuity, the English common law developed a set of procedural and substantive principles which over time have generated economically efficient answers to disputes.[56] Epstein identifies the few "simple rules," which with the intellectual discipline imposed by the doctrine of *stare decisis*, gave the common law its capacity to lead to efficient results.[57] These are, "individual autonomy, first possession – property rights, voluntary exchange, control of aggression, limited privileges for cases of necessity, and just compensation for 'takings' of private property."[58] These are the same principles which apply, more or less, to intel-

53. Convention has no more solemn voice than that of the ENCYCLOPEDIA BRITTANICA which states: "[a] patent is recognized as a species of property and has the attributes of personal property. It may be sold (assigned) to others or mortgaged or may pass to the heirs of a deceased inventor." 9 ENCYCLOPEDIA BRITTANICA, 194 (15th ed., 1994).

54. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1573 n.202 (1993) ("A plausible argument can be made that intellectual property rights will indeed increase efficiency. The focus of such arguments tends to be the contention that, in the absence of property rights, there will be underproduction due to 'free rider' problems).

55. *See generally* WILLIAM LANDES & RICHARD POSNER, AN ECONOMIC ANALYSIS OF TORT LAW (4th ed., Harvard Univ. Press 1987) [hereinafter LANDES & POSNER, ECONOMIC ANALYSIS]; WILLIAM LANDES & RICHARD POSNER, AN ECONOMIC STRUCTURE OF TORT LAW (3d. ed., Harvard Univ. Press 1988) [hereinafter LANDES & POSNER, ECONOMIC STRUCTURE]; *see also* RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (Harvard Univ. Press 1995).

56. *See* LANDES & POSNER, ECONOMIC ANALYSIS, *supra* note 52, at 10.

57. *See* EPSTEIN, *supra* note 52, at 15.

58. *Id.*

lectual property today in developed countries.

In the end, one can agree that holding a patent differs from owning a shotgun. The distinction between them is that of possessing a thing as opposed to the opportunity to make use of novel and useful idea or insight. Yet, the mutual quality of exclusivity before the eyes of the law binds them together. If it walks like a duck, sounds like a duck, and looks like a duck, it probably is a duck.

One qualification in the context of negotiating IPR in the FTAA is that most Latin American countries have a Civil Code tradition. As a result, their legal systems do not possess clear counterparts to *stare decisis* and other common law principles.[59] Nevertheless, Civil Code reasoning itself, has changed around the world, and the blending of Civil Code content and common law reasoning has been a hallmark of this century, particularly as legislation has gradually codified case law.[60] Models for further convergence do exist, such as the legal system of the Canadian province of Quebec.[61]

ii. The Evolutionary Nature of Rights

The power of convention is such that even though IPR may not have begun as a property right, they have evolved towards that identity. That is that their nature as property rights has been discovered gradually over time. This begs the question what then are rights? Simply put, they are protections of behavior and property which a society decides at some point to place outside of a cost to benefit analysis.[62]

Critics contend that the defenders of IPR as rights ultimately base their position on a notion that IPR are natural rights as defined

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59. *See generally* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION (1969) (discussing the civil law tradition effect upon judicial systems).

60. *See id.*

61. *See* Ugo Mattei, *Three Patterns of Law: Toxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 26 (identifying Quebec as a "mixed system"). *See also* Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WIS. INT'L L.J. 1, 2 (1996) (stating that Quebec combines civil and common law traditions in its legal system).

62. *See id.* at 415.

by John Locke.[63] That is if we have a natural right to own the fruits of our labor, we have no less a right to own the fruits of our ingenuity. What they attack is not the strength of the proposition, but rather the somewhat mystical nature of natural rights.

It is a reflection of our age that an appeal to the laws of nature falls under immediate suspicion. Regardless, what is important about IPR as rights is not their ultimate source. More significantly, they, as with other property rights, may be seen to represent pre-transactional social values[64] which provide a dividing line between the state and the individual as to the control of material possessions and of physical and mental effort. In contrast, if patents are construed as welfare-based regulations, then they constitute post-transactional distributions of wealth guided by the state towards a variety of social goals.[65]

A risk exists in trying too hard to deny the development of IPRs into fully accepted property rights. As Roger E. Meiners and Robert J. Staaf conclude "there is no basis to classify intellectual property as the grant of monopoly rights, unless numerous other rights that involve exclusion, such as home ownership or labor services, are classified as monopoly rights."[66] The further the state comes to see itself as the creator of value, the greater the temptation to use supposedly neutral utilitarian analysis to further its own, or rather its employees and beneficiaries, self interest.

iii. The Nature of IPR Change as Capitalism Changes

Just as the Renaissance created "new facts" as to the nature of capitalism and to the nature of man thus altering profoundly the treatment of innovation, so, too, may contemporary thinking about capitalism and the nature of man re-shape the value afforded to intellectual property protections. It may well tip the balance farther towards a property-rights based conception of intellectual

63. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § V (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

64. *See* Richard A. Epstein, *Foreward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1998).

65. *See id.*

66. *See* Roger E. Meiners & Robert J. Staaf, *Patents, Copyrights, and Trademarks: Property or Monopoly?*, 13 HARV. J. L. & PUB. POL'Y 911, 940 (1990).

property.

The impetus, the "new facts" lies beyond the obvious—an economy increasingly driven by technological advances and thus more heavily dependent on proprietary knowledge, be it in the new, computers and software, or the traditional, medicine and agriculture. This greater dependence on intellectual property is not changing the nature of modern capitalism, but rather allowing it to operate at a *qualitatively* higher level of efficiency.

New communication tools have sped the diffusion of both market information and production thus speeding up the articulation of consumer preferences and the ability of producers to respond. It is no longer necessary to have either a central market or a central factory. Technology has simplified and automated monitoring and process functions, thus reducing both transaction costs and personnel costs relative to a unit of economic output. Technology has allowed us to become more productive while at the same time subject us to fewer hierarchical and personal controls. Just as the innovations of banking and insurance awoke Florence to the possibilities of early capitalism, the greater economic role of intellectual property has brought into clearer focus Friederich Hayek's vision of "extended order" through the "rule of law."

As entrepreneurs flourish and more individuals work for themselves, roughly one in six North Americans, the concept of productive work in a capitalist economy has embraced new decentralized configurations. Work can be self-directed. High levels of economic activity can be sustained by networks of self-contracting individuals and not just by economies-of-scale corporations. This emergent free-agent capitalism will, in turn, give greater weight to another insight of "Austrian Economics" that our "producer surplus" lies less in the hours of our labour and more in our creativity.[67]

It would be insufficient to argue circularly that current capitalism's success with "owned" knowledge, such as patents, proves the case that property law, not policy wishes guide decision-

67. VIRGINIA POSTRELL, THE FUTURE AND ITS ENEMIES: THE GROWING CONFLICT OVER CREATIVITY, ENTERPRISE, AND PROGRESS 35 (The Free Press 1998).

makers. Just as in the Renaissance, economic opportunity is alone an incomplete force to change attitudes.

As in the Fifteenth Century, the legal recognition of intellectual property arose in response to both a new form of economic organization and to a new sense not just of self, but of its abstraction – the individual. If we are not surprised today that the nature of the economy is in flux, neither should we be if our ideas of the individual are shifting. At least, Western history shows individualism to possess an ontology or a story of change.[68] This cannot help but to alter the cultural boundaries within which we cast the nature and treatment of innovation and innovators. After all, it was a champion of the individual, not of economics, Lysander Spooner, the Nineteenth Century libertarian, who first coined the potent phrase, "intellectual property," recasting unalterably the debate.[69]

Will our society, in the new millennium, recognize even greater individual autonomy, thus further shielding IPR from state interventions? It should, but wishes are poor predictions. Still, if the hard-edged men of Renaissance Florence could figure out the advantage of patents in the first place, perhaps we can discern the added value of more firmly conceiving of intellectual property as individual property before the law.

b. The Welfare Tests for not Strengthening IPR

The point here is not to argue against standard normative economic analysis of intellectual property protections. It is just to point out that several of the efforts to do so have been fraught with problems, perhaps the result less of the underlying economic methodology and more of the researchers' biases in scope, duration and policy. The whole area deserves a thorough intellectual audit.[70]

68. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 8-14 (Harvard Univ. Press 1989).

69. See BETHELL *supra* note 52, at 259.

70. *See* Vivian S. Kuo & Gerald J. Mossinghoff, *World Patent System Circa 20XX, A.D.*, 38 IDEA: J.L. & TECH. 529, 537 (1998).

i. The Cost of Copying

A welfare analysis might easily prove governments in developing nations should encourage the free copying of foreign technology in order to jump start domestic industries at a relatively low cost. There is, however, one good reason to be skeptical that things will work out that way--the behavior of individuals in the market place typically frustrates the best-laid designs of government planners.

The following scenario demonstrates one possible outcome. Suppose a country orders the compulsory licensing of a MNE's patent, then awards the license to a domestic producer. That producer now possesses a "free good." That does not mean, however, that he has withdrawn from the market and all of its familiar dynamics and, thus, that the consumer will benefit from lower prices. First of all, the domestic producer will likely charge a "shadow" price, a price that is just below what patent-holders charged, knowing that the market will bear that price.[71] Though the producer will try to maximize his output with lower prices, he remains committed to increasing his surplus, not the consumer's.[72] In addition, the producer may also wish not to upset the politicians and bureaucrats who control the compulsory licenses.

As a result, the consumer's surplus may be quite small. It is likely to be smaller when the patent holder is forced to retreat from the market and the domestic producer no longer has to worry about competition in future price-setting decisions. More seriously, consumer could face the loss of potential surplus gains from new and improved products as patent holders delay entry into that market.[73]

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71. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 16 (4th ed. 1992) (explaining "shadow price").

72. *See* Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 ANTITRUST L.J. 1, 89 n.186 (1997) (presenting the debate surrounding "consumer surplus" and "product surplus"); also *see* Calvin S. Goldman & John D. Bodrug, *The Merger Review Process: The Canadian Experience*, 65 ANTITRUST L.J. 573, 583 (1997) (revealing another perspective in this debate).

73. For an analysis of the lost consumer surplus from "market chill" due to price controls, *see generally* OWEN LIPPERT, DRUG PRICE CONTROLS: WRONG SOLUTION FOR A NON-EXISTENT PROBLEM (Fraser Inst. forthcoming 1999). For an attempt to measure the effect of access to improved drugs in terms of life span and lifetime income, *see* Frank Lichtenberg, *Pharmaceutical Innovation, Mortality Reduction, and Economic Growth*,

One should not, however, be too much of an alarmist. Patent holders might still sell their products in risky markets, just more cautiously.

One could argue that if compulsory licenses were granted to multiple domestic producers, then this would stimulate the competition necessary to improve the consumer's surplus. Further research is needed to learn the extent to which compulsory licenses have been assigned to single or multiple domestic producers. I suspect that single producer licenses predominate for the reasons given below.

ii. Public Choice Perspective on Compulsory Licensing

Public Choice theory provides a reason for why compulsory licensing might lead to unintended consequences.[74] Compulsory licensing would appear to be a form of "producer capture" of regulatory bodies. That is, domestic producers in developing countries protect their own interests by convincing governments of the need to issue compulsory licenses of MNEs'[75] patents.[76] After the decision has been made, market tests are concocted to justify the expropriation. The political risk attached to compulsory licensing is initially quite low, as MNEs are generally unloved and unappreciated creatures of the United States and Europe.[77] The government officials who dispense these "rent-seeking" licenses do so in exchange for reasons ranging from the satisfaction of administering "industrial policy" to the public acclaim of protecting national

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NATIONAL BUREAU OF ECON. RESEARCH: WORKING PAPER NO. 6569 (1998).

74. For a general discussion of Public Choice Theory, *see generally* Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995).

75. *See* Robert C. Griffitts, *Broadening the States' Power To Tax Foreign Multinational Corporations: Barclays Bank v. Franchise Tax Board*, 46 CATH. U. L. REV. 243, 283 (1996) ("MNE is commonly used as a synonym for multinational corporation.").

76. *See* Michael L. Shain, *Thailand's Board of Investment: Towards a More Appropriate and Effective Rural Investment Promotion Policy*, 3 PAC. RIM L. & POL'Y J. 141, 182 (1994).

77. *See* Kojo Yelpaala, *In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies*, 7 NW. J. INT'L L. & BUS. 208, 246-47 (1985).

economic sovereignty to the accepting of outright bribes.[78]

It is hard to see how the consumers' interest would have a high priority in mutual rent-seeking agreements between domestic producers and government.[79] In short, the so-called economic benefits of compulsory licensing may prove to be merely the transfer of income from politically docile consumers to politically potent producers.[80]

The irony here is that domestic producers may not gain as much in the long run as they had expected. Economist Gordon Tullock observed that the profit record of companies protected by tariffs and government regulations did not appear to differ substantially from those not protected.[81] As a result, he postulated that any one company's gains made from government privileges, such as compulsory licenses, will not last.[82] They will be caught in a transitional gains trap in which bureaucrats and politicians will seek to capture their own rents from favored companies through a variety of means.[83] There is also the risk that the government will later cancel IPR privileges, such as compulsory licenses, in order to achieve more desired gains, such as trade access, in multilateral trade agreements.

78. *See* Finland: Computer Networking Hardware/Software Market, INDUS. SECTOR ANALYSIS, June 29, 1998, *available in* 1998 WL 11163465.

79. *See* Jeffrey L. Dunoff, *"Trade and": Recent Developments in Trade and Policy and Scholarship – and Their Surprising Political Implications*, 17 NW. J. INT'L. L. & BUS. 759, 772-73 (1996-1997).

80. *See* J.H. MacLaughlin, T.J. Richards & L.A. Kenny, *The Economic Significance of Piracy*, *in* INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? (R.M. Gadbaw & T.J. Richards, eds., Westview Press, 1988).

81. *See* GORDON TULLOCK, THE POLITICAL ECONOMY OF RENT SEEKING 224-35 (1993).

82. *See id.*

83. Tulloch states that, "[t]he successors to the original beneficiaries will not normally make exceptional profits. Unfortunately, they will usually be injured by any cancellation of the original gift. It would seem, as David Friedman has put it, that 'government cannot even give anything away.'" *Id.* at 476-78.

iii. Lack of Access to Technology and Dependency

A popular view holds that foreign technology is *sine qua non* necessary for economic growth in the developing world.[84] As a result, how it is less important how technology is acquired than that it is. Presumably, lower IPR standards best assure access to new technology.[85]

The discussion mirrors the error in the post-war development debate that simple capital accumulation could drive economic development.[86] That view has come under siege now that the billions spent in development aid are increasingly judged to have produced only marginal benefits for the average citizen in the developing world. To paraphrase the English economists, Peter T. Bauer and Basil S. Yamey, substituting the word "technology" for "capital", "[i]t is often nearer the truth to say that 'technology' is created in the process of economic development than that development is a function of 'technology' formation."[87] Few would deny that new technology plays some role in the economic growth of developing countries. Still, the means by which it was acquired might indicate the quality of pre-transactional property rights that may help to determine the long-term economic benefits derived.

The focus on foreign technology may also perpetuate the now problematic "dependency" theories of Argentine social scientist and former director of the United Nations Conference on Trade and Development ("UNCTAD"), Raul Prebisch.[88] He assumed that technology could only come from the Center, and that dependency of Periphery on the Center is an active cause of underdevelopment.[89] Granted, many Latin American countries have not

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84. *See supra* note 67 and accompanying text.

85. *See supra* note 47 and accompanying text.

86. *See* Lena Cao, *Law and Economic Development: A New Beginning?*, 32 TEX. INT'L L.J. 545, 551-52 (1997).

87. *See* Alan Rufus Waters, *Economic Growth and the Property Rights Regime, in* THE REVOLUTION IN DEVELOPMENT ECONOMICS 109 (James A. Dorn et al. eds., Cato Inst. 1998).

88. *See, e.g., Commercial Policy in Underdeveloped Countries*, AM. ECON. REV. May 1959, at 251-73 (examining commercial policies in underdeveloped countries).

89. *Id.*; *see also* Dr. Richard Bernal, *Regional Trade Arrangements in the Western Hemisphere*, 8 AM. U. J. INT. L. & POL'Y 683, 699 (1993) (discussing trade arrangements

had the experience of strong IPR and may not fully understand its positive effects on indigenous technology.[90] Still, there is no reason to assume that these countries could not generate as many advances in knowledge on a per capita basis as any other. The problem lies not in the intelligence and creativity of the citizenry, but in the institutional protections afforded the fruits of their labor.[91]

Among the more critical factors is the institutional framework which determines the incentives and transactional costs of contracting. As Nobel Prize-winning economist, Douglass C. North asserts, it is institutions and ideology that together shape economic performance. Institutions affect economic performance by determining the costs of transacting and producing.[92] The work of Douglass C. North and others such as Oliver Williamson, referred to as the New Institutional Economics, builds upon the seminal ideas of Ronald Coase in his two now famous articles on the nature of the firm and on transaction costs.[93]

Briefly stated, one of Coase's fundamental insight is this: the sustained economic success of a country does not depend on any initial or subsequent endowment of capital and technology, but rather on its ability to maintain institutions of formal and informal rules that keep low "the costs of measuring the valuable attributes of what is being exchanged and the costs of protecting rights and policing and enforcing agreements." [94] At the core of reducing transaction costs is a stable, clear and enforced system of property rights.[95] As Armen Alchian pointed out over thirty years ago,

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in the Western Hemisphere).

90. *See, e.g.*, Amy R. Edge, *Preventing Software Piracy Through Regional Trade Agreements: The Mexican Example*, 20 N.C. J. INT'L L. & COM. REG. 175, 193-95 (1994) (examining Mexico's response to software piracy through trade agreements).

91. *See id.* at 193-99.

92. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (Cambridge Univ. Press 1990); *see also* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (The Free Press 1987).

93. RONALD H. COASE, THE FIRM, THE MARKET AND THE LAW, 33-55, 174-79 (Univ. of Chicago Press 1988).

94. *See* NORTH, *supra* note 92, at 27; *see also* Avinash Dixit, *The Making of Economic Policy: A Transaction-Cost Politics Perspective*, *in* MUNICH LECTURES IN ECONOMICS 37 (MIT Press 1996).

95. *See* Joel P. Trachtman, *Section IV: A Sketch of the law and economics of property rights, in Chapter 17, Externalities and Extraterritoriality: The Law and Economics*

"[t]he existing system of property rights establishes the system of price determination for the exchange of or allocation of scarce resources. Many apparently diverse questions come down to the same element – the structure of property rights over scarce resources. In essence, economics is the study of property rights."[96]

IPR are part of a legal and institutional framework, which by lowering transaction costs, can create the conditions necessary for economic growth. If strong protections can be created and held in place, contractual efficiency should ensure that not only will new local technology be discovered, but more importantly, domestic and international technology can be fully exploited. Faith in this possibility may explain why both EMBRAPA, the research arm of the Brazilian Ministry of Agriculture, and ABRABI, an association of Brazilian biotechnology companies, have come out in support of their country's upgrading of IPR protections.[97] Contractual efficiency should also lower the costs and improve the results of local industries receiving, adapting, and utilizing foreign technology. It is only an assertion, but one worthy of further research, that overall contractual efficiency could also compensate for the costs and inconveniences to second stage innovation caused by researchers having to invent around existing patents.[98] A society's overall contractual efficiency, however that may be measured, may prove critical in its ability both to adapt and invent new technology.

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of Prescriptive Jurisdiction, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES, 658, 658-682 (Jagdeep S. Bhandari & Alan O. Sykes, eds., Cambridge Univ. Press, 1997).

96. ARMEN A. ALCHIAN, PRICING AND SOCIETY 6 (Inst. of Econ. Affairs ed., 1967).

97. Telephone interview with Robert Sherwood, Attorney and Consultant, in Washington, D.C. (July 30, 1998).

98. *See* R.P. Merges & R.R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990).

iv. IPR and Anti-trust Law: An Uneasy Mixture

The latest welfare test of IPR has arisen from the application of competition policy or anti-trust law in the American vernacular.[99] The equation of IPR and market "monopolies" has raised the possibility of new constraints on the exercise and scope of IPR.

Whether patents, for instance, should be subject to anti-trust policies is still a fluid question. Kenneth W. Dam argues that the use of the word "monopoly" to describe patents was a political definition of the Depression-era American Supreme Court borne of the Depression, rather than a product of economic analysis.[100] Still, The United States and other countries, through case law and legislation respectively, have for some time restricted some actions by patent holders if it is determined that their patents create "market power." Courts of the United States have developed the doctrine of "patent abuse,"[101] including the grounds upon which a patent holder may be forced to grant a license.[102] They have also developed prohibitions against patent holder linking the grant of a license to the purchase of another product.[103]

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99. *See* J.H. Reichman, *Compliance with the TRIPs Agreement: Introduction to Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363, 374-78 (1996). *See generally*, COMPETITSION POLICY AND INTELLECTUAL PROPERTY RIGHTS IN THE KNOWLEDGE-BASED ECONOMY (Robert D. Anderson & Nancy T. Gallini eds., 1998) (discussing intellectual property rights and competition policy).

100. *See* Kenneth W. Dam, *The Economic Underpinning of Patent Law*, 23 J. LEGAL STUD. 247, 268-70 (1994).

101. *See* Amy Jacqueline Grason, *IBM v. Comdisco: Are Modified 3090 Computers Counterfeit?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 93, 117 & n.160 (1994). The doctrine of patent abuse reflects one view of the judiciary in which intellectual property rights could pose a danger to a free marketplace. *See id.* The modern status of the doctrine of patent abuse is somewhat unclear. Kevin J. Arquit, *Patent Abuse and the Anti-trust Laws*, 59 ANTITRUST L. J., 735, 740-42 (1991). The essence of the doctrine is that where a patent is used to unreasonably restrain trade, it cannot be enforced until a "purge" has been effected. Robert J. Hoerner, *Patent Misuse: Portents for the 1990s*, 59 ANTITRUST L. J., 687, 689-92 (1991). The patent abuse doctrine derives from the observation that patents are "an exception to the general rule against monopolies," and thus cannot be unlimited. Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 846 (1945).

102. *See, e.g.*, Dawson Chem. Co. v. Rohm and Haas, 448 U.S. 176 (1980) (holding that company conduct did not arise to patent abuse).

103. *See* United States v. Microsoft Corp., 147 F.3d 935, 937 (D.C. Cir. 1998).

Linkage is the issue largely at heart in the American Justice Department's current action against the Microsoft Corporation.[104] It is alleged that Microsoft Corporation would not license the Windows Operating System to computer manufacturers unless their Internet Explorer was included.[105]

The risk exists that the use of anti-trust doctrines may unintentionally reduce such IPR benefits such as the incentive-to-invent.[106] Potential for misuse grows out of a fundamental misunderstanding of the nature of patents. A patent does not guarantee any position, dominant or otherwise, in a market. It is simply one protection afforded to an individual or company seeking to make an economic rent from a unique innovation.[107] By its definition, a unique innovation creates a unique new market.[108] A patent only grants exclusivity to the invention, not to the market served by the invention.[109] An invention, by its success in a market, may actually stimulate research by others to re-create that success with a new product.

The important questions about the market power of a patent are whether substitutes exist for a new product–is the market contestable and whether other individuals have the opportunity to invent new substitutes. If the answer to both is "yes," then there cannot exist a monopoly as understood in economics. In practice, the dominant position of any new bit of intellectual property in the market has not lasted for long and usually not as long as the patent or copyright protection afforded.[110] Put another way, Microsoft Windows will eventually face much stiffer competition than it does today, which will arise sooner rather than later.[111] The very ups and downs of the Microsoft case suggest great caution in judging

104. *See id.*

105. *See id.*

106. For a supporting discussion based on a study of the results of using the "essential facilities doctrine" to order compulsory licenses, *see* R. J. Gilbert & C. Shapiro, *An Economic Analysis of Unilateral Refusals to License Intellectual Property*, 93 PROC. NATL. ACAD. SCI. U.S. 249, 249-55 (1996).

107. *See id.* at 249-251.

108. *See id.*

109. *See* Dam, *supra* note 97, at 270.

110. *See* Reuven Brenner, *Market Power: Innovations and Anti-Trust, in* THE LAW AND ECONOMICS OF COMPETITION POLICY 179-216 (F. Mattheson et al. eds., Fraser Inst. 1990).

111. *See supra* note 103-104 and accompanying text.

the market effects of patents in an anti-trust legal framework.

To date, international trade agreements have incorporated only a few, relatively ill-defined anti-trust policies. The TRIPs agreement, however, creates the possibility for the inclusion of further antitrust measures.[112] The issue is a familiar one in which some welfare test, rather the procedural protections of property law, might determine the extent of IPR protections.

Indeed, Michael Trebilcock and Robert Howse have argued that countries should be able to use their IPR standards to their competitive advantage.[113] By the same measure, they would also design other forms of regulation, such as environmental and health and safety standards to advance domestic industrial policy.[114] They argue further that international trade agreements ought to entrench the flexibility of standards to ensure that such a comparative advantage can be exploited.

One can agree with Trebilcock and Howse that countries should have the scope under any trade negotiation to tailor their regulatory regimes to their advantage within, of course, the bounds of their international commitments.[115] IPR, however, should be considered part of a country's legal foundation of rights, and not of its regulatory regime. As said earlier, IPR are more properly part of a social pact on pre-transactional values rather than the distribution of post-transactional income.

The court of world opinion would rightly condemn a country if it argued that upholding human rights imposed a unfair competitive disadvantage. Property rights are human rights, and intellectual property rights are property rights. All deserve respect.

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112. *See* TRIPs Agreement, *supra* note 5, at art. 2(1).

113. *See id.*

114. *See* Michael Trebilcock & Robert Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6 EURO. J.L. & ECON. 5, 5-37 (1998) [hereinafter Trebilcock & Howse I]; Michael Trebilcock & Robert Howse, *Trade-Related Intellectual Property in* THE REGULATION OF INTERNATIONAL TRADE (2d ed. Routledge 1998) [hereinafter Trebilcock & Howse II].

115. *See* id.

3. IPR as an Integral Part of the Critical Package of Rights

In sum, IPRs are just one, perhaps small, part of the complete package of individual rights upon which sustainable economic opportunity and development ultimately depends.[116] If a country chooses to adopt one set of accepted rights because they are valued and convenient, it cannot then ignore other rights or downgrade them to regulatory options, without weakening rights as a whole. This is consistent with the oft-heard argument that developing countries pursue an immature and short-sighted strategy in solely pursuing property rights while, at the same time, largely ignoring civil and political rights.[117]

The value of adopting stronger IPR protection in developing countries lies in the additional pressure to strengthen their institutional capacity to define, monitor, and enforce property rights as a whole.[118] In this light, Edmund Kitch's "prospect theory" argued that the value of IPR lay in its ability to control the development of breakthrough discoveries deserves a more positive evaluation than it seems to be getting.[119] The short-term costs include the upgrading of the judicial, legal, and administrative systems, the training of the legal community, and the bolstering of private managerial competence to contract and license technology.[120] These are comparatively small costs in dollar terms, but much larger in the sense that they depend on conveying a vision of why and how they will benefit a country. The largest cost is the cost of restraining governments from exploiting IPR in order to play industrial favorites for the benefit of some producers, politicians, and bureaucrats.[121]

In a climate of robust property rights, governments are not un-

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116. *See* Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465, 469 (1994).

117. *See* Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 122 (1993).

118. *See* Willard Alonzo Stanback, *International Intellectual Property Protection: An Integrated Solution to the Inadequate Protection Problem*, 29 VA. J. INT'L L. 517, 523 (1989).

119. For a discussion of Kitch's "prospect theory," *see* J.H. Reichman, *supra* note 99, at 371-72.

120. *See id.* at 372-79.

121. *See id.*

duly restrained. They may choose to expropriate intellectual property as long as due compensation is paid. Consistent with the "rule of law," governments can use creative measures such as patent buy-outs to ensure the rapid diffusion of technology and knowledge. This has happened before. In 1839, the French government purchased the patent on the Daguerreotype process and placed it in the public domain.[122] That decision allowed France to lead the world in the creative development of photography during the subsequent century.

B. *If the Negotiation of Higher IPR Standards is an Effective Lever to Advance Free Trade, Then Let it be Used to Greatest Effect*

Though often questioned and challenged, free trade remains the dominant policy to improve the welfare of individuals in the world.[123] Despite the stunted "import-bad, export-good" mentality of the seven GATT Rounds, they have brought the world closer to realizing the benefits of global free trade. Average global tariffs on manufactured goods have fallen from forty percent to three percent since the implementation of the Uruguay Round cuts have been implemented.[124] Given the importance of trade in the post-war economic growth of developed and developing countries, it is surprising that it took so long to examine the state of domestic IPR regimes, both as source of potential non-tariff barrier to trade and as a bargaining chip in multilateral trade negotiations.

122. *See* Michael Kremer, *Patent Buy-Outs: A Mechanism for Encouraging Innovation Program*, *in* NATIONAL BUREAU OF ECON. RESEARCH WORKING PAPER No. 6304 (1997). Kremer claims "such patent buy-outs could eliminate monopoly price distortions and incentives for wasteful reverse engineering, while raising private incentives for original research closer to their social value." *Id.*

123. For the challenges, *see* DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE (1996).

124. *See id.*

1. Why did the Rise of Counterfeiting lead to the linking of IPR and Trade?

IPR did not arise as a trade issue out of some theoretical appreciation of the benefits of free trade.[125] The genesis lay in the concluding years of the Tokyo Round when the United States sought a new lever, trade access, to suppress counterfeiting.[126] By raising the matter in the GATT talks, American negotiators sought to leverage wider access to the United States market against improved IPR enforcement in other countries.[127] Most nations, unfamiliar with this novel linkage, resisted and nothing initially came of the American initiative.[128] Merits of this particular linkage aside, it made strategic sense to introduce at least some linkages in the GATT talks because of the wider scope for concluding complex agreements when multiple trade-offs are available.[129]

The United States' concern over counterfeiting seemed to some an over-reaction, given both the small percentage of the American economy dependent upon exports, ranging between ten and fifteen percent, and the relatively small amount of lost revenue, which even the most generous of estimates placed at between $15 to $20 billion out of an annual foreign trade of $850 billion in 1996.[130] Yet the intensity of the American concern reflected the concentration of those losses in three key industries: computer software, motion pictures, and pharmaceutical drugs.[131] These industries,

125. For the latest background on this development *see* RYAN, *supra* at note 51, at 48.

126. The following section owes its insights to conversations with former Canadian trade officials Michael Hart, Carleton University and Sylvia Ostry, University of Toronto; former United States chief negotiator for NAFTA, Julius Katz, Washington, D.C., and professors Michael Trebilcock, University of Toronto and J.A. VanDuser, University of Ottawa.

127. *See supra* note 126 and the accompanying text.

128. *See id.*

129. For a discussion of the regional and multilateral approaches, *see* Keith E. Maskus, *Implications of Regional and Multilateral Agreements for Intellectual Property Rights*, 20 THE WORLD ECONOMY 5, 681-94 (1997).

130. *See* JONATHAN D. ARONSON ET AL., PROTECTING INTELLECTUAL PROPERTY 5 (1998).

131. *See* Gerald J. Mossinghoff & Ralph Oman, *The World Intellectual Property Organization: A United Nations Success Story*, 79 J. PAT. & TRADEMARK OFF. SOC'Y

unlike others, purportedly receive roughly fifty percent of their total receipts from overseas markets.

As preparations began for the Uruguay Round, the United States representatives re-thought how to introduce the counterfeiting issue. As the Americans deliberated, they realized that pursuing counterfeiting alone was the equivalent of looking down the wrong end of the telescope.[132] To achieve any progress in the area of counterfeiting meant addressing the broader issue of intellectual property. Under this view, counterfeiting was just one manifestation of the fragmented and porous IPR regimes that presented American businesses with both the prospect and reality of lost profits due to illegal or legal copying.[133]

The American initiative to raise IPR in trade negotiations also reflected a dissatisfaction with the substantive international IPR standards maintained by the World Intellectual Property Organization ("WIPO") and the enforcement mechanisms provided by the International Court of Justice ("ICJ").[134] To be fair, WIPO and the ICJ were never intended to be the cop and judge of international intellectual property.[135] They were designed as means to help countries look after their own IPR regimes.[136] They faced the challenge of any multilateral organization in setting an international agenda: in order to achieve consensus among the member states, some 129 in the case of WIPO as of 1995, substantial compromises have to be made. In the case of WIPO's model frame-

691, 691-92 (1997).

132. *See id.*

133. *See id.*

134. Based in Geneva, Switzerland, WIPO is responsible for administering the terms of, among others, the Paris and Berne Conventions as amended by periodic diplomatic conferences. The Paris and Berne Conventions allow countries to bring disputes to the ICJ. *See* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised Oct. 31, 1958, art. 2, 828 U.N.T.S. 109, 115, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]. *See also* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3. [hereinafter Berne Convention].

135. *See id.*

136. *See* Trebilcock & Howse I, *supra* note 114, at 258.

work law for IPR, exceptions placed the level of protection at the lowest common denominator.[137] As a result, it has continued to lose relevance to the actual contemporary practice of trade in goods and services with significant intellectual property content.[138] The ICJ, suffice to say, has never actually heard an IPR case and, if it did, it would only serve to clarify what the WIPO model framework law states.[139]

The American decision to pursue IPR standards in the Uruguay Round also reflected a need to shore up domestic support for trade liberalization.[140] The inevitable reaction to any major effort to lower tariffs is fear of new competition in goods and wages.[141] Ross Perot, Patrick Buchanan, and the AFL-CIO all enjoyed substantial amounts of media attention by playing to the "blue-collar" fears of factories packing up in the middle of the night to sneak off to Tiajuana.[142] Allies were needed. What better allies than the industries who stood the most to gain. It is not unfair to say that the pharmaceutical, software, and entertainment industries were maneuvered into fighting some of the United States administration's non-IPR battles.[143]

2. The Origins and Significance of TRIPs

As a result of the efforts of the United States government, the Uruguay Round established a separate set of discussions to reach a minimum set of standards for IPR protection among the GATT signatory nations.[144] These talks ultimately led to the 1994 TRIPs agreement. The content of the discussions has been closely, almost

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137. *See id.* at 263.

138. *See id.*

139. *See* Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT & TRADEMARK OFF. SOC'Y 121, 131 (1994).

140. *See* JEFFREY J. SCHOTT ASSISTED BY JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT 30 (Inst. for Int'l Econ. 1994).

141. *See id.* at 32-33.

142. *See id.* at 33.

143. *See generally* Harvey E. Bale, Jr., *Patent Protection and Pharmaceutical Innovation*, 29 N.Y.U.J. INT'L L. & POL. 95 (1997) (examining the trial and tribulations of patent protection and pharmaceutical innovation).

144. *See* SCHOTT, *supra* note 140, at 30.

exhaustively, analyzed.[145] Most agree the nub was a global package deal: the United States would, itself, provide, and would pressure the European Community to grant the same, greater market access to the agricultural and textile products of the developing world in exchange for a agreement on an international standard for IPR.[146]

The TRIPs agreement, building on the principles of the Paris and Berne conventions, obliged signatories to adhere to, first, an international baseline for standards of protection for all areas of intellectual property—patents, trademarks, copyrights.[147] Second, TRIPs requires effective enforcement measures, both at the border and internally.[148] Third, the signatories must adhere to the dispute settlement provisions of the World Trade Organization ("WTO").[149]

The prospect of TRIPs helped to motivate American support for the Uruguay Round.[150] Without a strong commitment by the United States Government, the Uruguay Round could have failed to advance the cause of free trade.[151] It nearly did anyway. Though some developing countries questioned the price of TRIPs in terms of lost economic sovereignty, the gains from increased trade access proved irresistible, particularly considering the alternative of increased unilateral trade sanctions under the United State's Section 301 and Special or "Super" 301 processes.[152]

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145. *See id.*

146. *See* Cordray *supra* note 139, at 143.

147. *See* TRIPs Agreement, *supra* note 5, at art. 2(1).

148. *See id.* at arts. 41-61.

149. *See id.* at art. 64.

150. *See* SCHOTT, *supra* note 140, at 30.

151. *See id.*

152. *See* 19 U.S.C. §§ 2411-2420 (1994). Section 301 of the 1974 Trade Act gives the President and his delegate, the United States Trade Representative, the ability to investigate government practices in other countries to see if they present an unfair burden to American firms. Special 301 of the 1988 Trade Act specifically covers IPRs protection and the market access for knowledge-intensive American goods. Special 301 authorizes the United States Trade Representative to remove trade benefits such as MFN trade rates if after a set deadline the offending government's practices are not modified or removed. The exercise of Special 301 penalties remain consistent with the United States's WTO commitments as long as WTO dispute settlement procedures have been accessed first.

The FTAA presents one more opportunity to bring global free trade closer to reality. It would set the example of an entire hemisphere removing tariffs and other barriers, if one takes at face value the declaration of the thirty-four national leaders at the 1994 Miami Summit of the Americas. The prospect of improved IPR standards may once again persuade the American government to take a strong leadership role.

It would be misleading and counter-productive to characterize the current negotiations as simply the United States trying to extort concessions from its reluctant neighbors. First, many hemispheric nations are currently upgrading their IPR for purely domestic reasons.[153] Second, and more importantly, after the rebuff of Chile's fast-track request, it remains difficult to assess the United States' will to push forward on hemispheric trade deals.[154] The United States administration still has to convince the leaders of influential industries who do not have an immediately clear stake in improved IPR, such as agriculture and textiles, that the prospect of increased competition would be offset by new trade opportunities for all American industries. In a strategic sense, the developing nations of the hemisphere rely on the authority of the President to overcome protectionist lobbies in the Congress.[155] A weakened presidency leaves doubt as to the resolve of America's trade leadership.[156]

C. *TRIPs itself is an Evolutionary Step Towards a Yet Unknown, but Implicitly Acknowledged, International Standard*

TRIPs is a revolutionary agreement, this no one disputes. It was the first time that an international standard of intellectual property was agreed upon by a majority of nations. Virtually no country has avoided making some commitment to change to its

153. *See* Edge, *supra* note 90, at 202-04.

154. *See* Miguel Otero-Lathrop, *MERCOSUR and NAFTA: The Need for Convergence*, 4-SUM NAFTA: L. & BUS. REV. AM. 116, 120 (1998).

155. *See id.* at 121-22.

156. *See* David A. Gantz, *The United States and The Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. L. 381, 391-405 (1997).

IPR regime. J.H. Reichman and others wisely counsel that realizing practical gains from the textual advances of TRIPs will take far more time and effort than many in the developed world expect.[157] Yet, TRIPs is not an ideal document. Much is unduly vague and complex.[158] TRIPs' central accomplishment is that it acknowledges that an international standard exists, rather than its definitive formulation of such a standard.[159]

The content of TRIPs itself, can be described as defensive. Its articles characterize the existing diversity of IPR regimes, rounding them up rather than down, then applies to this picture a "standstill" provision. The goal of TRIPs for American and European negotiators was more to restrain developing countries from any further erosion of IPR protection and less to revise IPR standards substantially upwards.[160]

TRIPs left both issues of substance and language unresolved. For instance, the major issues include what restrictions will be imposed on compulsory licensing, the scope of price controls, what to do when patents expire in one country but not another, and how to provide better enforcement at the border.[161] In addition, areas such as the treatment of encrypted satellite signals, advanced biotechnology, and commercial data bases were left off the table because of a lack of information or of consensus.[162] It is unclear what is meant by terms such as "significant investment,"[163] "taking account

157. *See* Reichman, *supra* note 17, at 261-63.

158. *See generally* M. Bruce Harper, *TRIPS Article 27.2: An Argument For Caution*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 381 (1997) (evaluating Article 27.2 of the TRIPs Agreement).

159. *See* Rochelle C. Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 279 (1997).

160. *See* Cheng, *supra* note 25, at 2013 n.30. TRIPs was intended to provide a minimum of intellectual property rights. *See id.*

161. *See* Jeffrey A. Wolfson, *Patent Flooding in the Japanese Patent Office: Methods For Reducing Patent Flooding and Obtaining Effective Patent Protection*, 27 GEO. WASH. J. INT'L L. & ECON. 531, 557-58 (1994).

162. *See generally* Harper, *supra* note 158. This piece provides just one example of the subjects left open to argument and interpretation in TRIPs.

163. *See* TRIPs Agreement, *supra* note 5, at 1224 (referring to "significant investment").

of the legitimate interests of third parties"[164] and the limits on remedies.[165] Other terms are sprinkled throughout the text, words such as "substantially,"[166] "reasonably"[167] and "legitimate,"[168] all of which invite misunderstanding. TRIPs cannot be considered as the final word on an economically efficient and legally coherent global IPR standard.

Both developed and developing countries stand to gain from a prompt outlining of such an optimal global standard. For developing countries, the benefit lies in reducing uncertainty in domestic policy[169] and ameliorating international commercial conflicts[170] created by the constant flux in IPR obligations. The fact that different countries have different capacities to implement such a standard should not deter the effort to define it. It is possible that countries may agree to a IPR standard that they simply do not have the institutional capacity to translate into reality. Yet, they should be able to remove the most offending practices such as discriminatory compulsory licenses.

Non-compliance on the basis of under-developed institutions is in some sense preferable to non-compliance on the basis of unreformed legislation and regulation, though complete compliance should remain the priority. The former is a matter of time, the latter a matter of political determination. By that I mean non-compliance on the basis of institutional capacity is preferable to active non-compliance because it shifts the emphasis to technical issues[171] and away from competing visions of political economy. Opinions differ, however, on how far you should let the cart get ahead of the horse.

It would be a lost opportunity not to employ the FTAA as a

164. *Id.* at 1207 ("taking into account of the legitimate interests of third parties").

165. *See id.* at 1215 (referring to limiting remedies).

166. *See id.* at 1174 (referring to "substantially").

167. *See id.* at 1173, 1183 (referring to "reasonably").

168. *See id.* at 1170, 1197 (referring to "legitimate").

169. *See generally* Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769 (1997) (discussing intellectual property norms in international trading agreements).

170. *Id.*

171. *See* Edge, *supra* note 90, at 202-04.

means to further define an optimal global standard, not withstanding the possibility of conflict. Any serious set of negotiations needs some conflict to expose and define the interests at work, ultimately revealing possible compromises. At a bare minimum, the FTAA should ensure no regression towards the notion of two separate IPR standards, one for the developed world and one for the developing world. To do so would impose the model of aboriginal Indian reservations on international IPR law, superficially protective and ultimately debilitating.

D. *The Origins of the FTAA in NAFTA Suggests a Similar or Higher Standard of IPR Protection*

More significant than TRIPs to the future of the FTAA negotiations is the IPR chapter of the 1993 NAFTA treaty among the United States, Canada, and Mexico.[172] The FTAA, itself, came into being as a possible successor to NAFTA. That was the rhetoric, at least, of the thirty-four leaders who met in Miami in April 1994 to declare their commitment to eliminate hemispheric tariffs by the year 2005.[173] Since then, the Mexican currency collapsed,[174] President Clinton failed to secure "fast track" approval from the Congress for Chile's entry into a NAFTA-like trade agreement,[175] and strong critics of free trade on both the Left and Right have emerged in virtually every country.[176] Still NAFTA remains the model for the FTAA.

Does that then mean that the IPR in the FTAA should resemble the content and structure of NAFTA? The answer is Yes and no. Yes in the sense that Canada, the United States, and Mexico would have just cause to deny new signatories the complete tariff benefits of an expanded NAFTA if they got to "cherry pick" which NAFTA obligations they would adopt. NAFTA was signed as a package deal and was only possible because of its all-or-nothing

172. *See* Jane Bussey, *Optimism Amid Upheaval – Regional Woes Could Impact Talks*, MIAMI HERALD, Aug. 30, 1998, at 1F.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

structure of negotiations.[177] Each country weighed the trade-offs in NAFTA, then signed the agreement because *as a whole* it promised a net benefit.

Yet every negotiation should have its own dynamic based on an understanding of underlying commonly held principles. What is important is some shared vision as to what IPR protection should produce. Such a vision is not exclusively American, Canadian, or Mexican.

It is also worth noting, as Robert M. Sherwood and Carlos A. Primo Braga have, that a common base for a hemispheric IPR agreement also lies in the intensification of the regional integration accords ("RIAs"), such as MERCOSUR, the Group of Three Accord and Andean Common Market ("ANCOM") through which IPR harmonization is already being addressed.[178]

E. *If IPR are Going to be Strengthened in the Western Hemisphere, Let's go Once not Twice to the Dentist, Especially with a "Millennium" Round of Global Trade Talks on the Horizon*

1. The Trouble with the TRIPs Deadline

Though good reasons exist to proceed swiftly to the negotiation and implementation of an IPR agreement in the FTAA, strong impediments remain to prompt action. All countries have until 2005 to negotiate the FTAA. Some countries have until 2005 to implement TRIPs fully.[179] Countries, taking the line of least resistance, could argue that if they have until 2005 to implement TRIPs, why should they negotiate a whole new set of IPR obligations in the FTAA. Such a position, however, could jeopardize the current opportunity to put the IPR issue to rest for the foreseeable future.

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177. *See* Jane Bussey, *Not Willing to Wait, Countries Lay their Own Fast Tracks*, MIAMI HERALD, Apr. 13, 1998 at 1H.

178. *See* Robert M. Sherwood & Carlos A. Primo Braga, *Intellectual Property, Trade and Economic Development: A Road Map for the FTAA Negotiations*, *in* 21 THE NORTH-SOUTH AGENDA PAPER, §§ 3-4 (North-South Center, University of Miami ed., 1996).

179. *See Agreement of Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, 33 I.L.M. 81, 107 (1994).

An unusual feature of TRIPs was its comparatively long deadline for developing nations to implement the agreement.[180] Developing countries already in transition away from centralized economic control may postpone some of their TRIPS obligations until January 1, 2000.[181] Countries who did not have product patent protection laws for advanced items such as pharmaceuticals at the time of signing, have until 2005 to comply.[182] The very least developed countries have until 2006 to raise their patent protection to the TRIPS standard.[183] In contrast under NAFTA, Canada and the United States had to give immediate force to the provisions on January 1, 1993.[184] Mexico had a grace period of up to three years on some of its obligations.[185]

Two reasons explain the extended implementation period in TRIPs. It reflects, to a degree, the very uneven state of substantive IPR law and enforcement mechanisms among countries. No one would dispute that developing countries face difficult challenges in bringing the law and the reality of intellectual property up to the level of TRIPs. The possibility exists that the actual commitment to strengthened IPR by some countries was marginal at best.

The long deadlines of TRIPs have likely tempted some current government leaders to avoid dealing with the state of their country's IPR protections. Why bother when the deadlines create the opportunity to pass the problem on to a potential successor. Whoever he or she is would be the one to face the political and economic fallout which might accompany any upgrade of domestic

180. *See id.* at 107-08.

181. *See id.*

182. *See id.*

183. *See id.*

184. Canada had earlier taken remedial steps in the area of IPR. In preparation for NAFTA and TRIPs (though NAFTA was implemented before TRIPs, the IP section was negotiated after the general thrust of TRIPS was evident), Canada revised its patent law with Bill C-91 in 1993. It extended a full twenty years of protection to all patents including those held by brand-name pharmaceutical companies, thus ending its fifteen year experiment with compulsory licensing.

185. By July 1994, Mexico's patent law was substantially upgraded and the Mexican Industrial Property Institute ("MIPI") was created to monitor and enforce the law including, upon request of private parties, the search and seizure of counterfeit goods. *See* Edwin S. Flores Troy, *The Development of Modern Frameworks for Patent Protection: Mexico, A Model For Reform*, 6 TEX. INTELL. PROP. L.J. 133, 146-151 (1998).

IPR standards to the TRIPs level. It is relatively easy to agree to a difficult policy that someone else will have to implement. The deadlines also raise the possibility that successive governments, having never signed the original agreement, may not consider themselves bound to it to the same degree as the previous administration.

In Canada, it was a Progressive Conservative government under Brian Mulroney who upgraded the patent laws in 1993 to provide for a full twenty year protection.[186] Four years later, Alan Rock, the Attorney General of the new Liberal government, was publicly speculating that the term of patent protection could be shortened from twenty years.[187]

Long deadlines invite failure. In the absence of sensible deadlines, it is responsible to press for accelerated implementation. If the FTAA negotiations on IPR can be fast-tracked, the nations of the western hemisphere could reach a one-time agreement on IPR standards and move on a single implementation schedule. If there are two overlapping implementation schedules, first TRIPs, then FTAA, it will lead to unnecessary friction. A one-shot implementation schedule is possible given the limited substantive differences between TRIPS and NAFTA's Chapter Seventeen.[188]

2. Millennium Round

The prospect of a "Millennium Round" of WTO talks should give a special impetus to fast-tracked FTAA IPR negotiations with a single short implementation schedule. The FTAA could prove the testing ground for the "Millennium" IPR standard with the western hemisphere countries pulling ahead of the rest of the world by already having such a standard in place.

The European Community President, Leon Brittan, has already issued the call for a "Millennium Round" of WTO talks. President

186. *See* Edward Greenspan & Anne McIvoy, *Rock gets ready to roll*, GLOBE AND MAIL, Jan. 19, 1998 at A1.

187. *See* Bill McArthur, "Property Rights and The Pharmaceutical Industry," paper presented at the The Canadian Property Rights Research Institute meeting, Calgary, Alberta, Mar. 21, 1998 available at <http://www.canprri.org>.

188. *Compare* TRIPs Agreement, *supra* note 5, *with* NAFTA, *supra* note 37. The differences are discussed in *infra* Part II.

Clinton made a similar plea in his 1998 State of the Union Address. Sundry scholars, politicians, and business people have supported this initiative.[189] If a "Millennium Round" begins, say in the year 2000, two things are possible. First, the FTAA talks could potentially be subsumed into it. Second, a TRIPs II will begin.

This is not to suggest that the FTAA could prove to be a waste of time and effort. To the contrary, the FTAA could deliver a NAFTA-level of IPR protection that would serve as a world standard. In addition, with an accelerated implementation schedule, the FTAA nations could, in one shot, reach their TRIPs, FTAA and future TRIPs II obligations. If that is achieved, the issue of IPR could take a long-deserved breather from both the international agenda and the domestic agenda of developing nations.

At any rate, even if the "millennium" round absorbs the FTAA, the FTAA will have proven beneficial as a training exercise for both the developing and developed countries of the hemisphere. For developing countries in South America, the FTAA provides an excellent capacity building exercise.[190] They are learning how to handle multilateral trade negotiations of almost incredible complexity more aggressively and effectively.[191] In part, this new found confidence is the result of the smaller scale and tighter focus of a regional negotiation. The developing countries also have the opportunity to re-affirm among themselves the growing Latin American consensus regarding what stimulates economic growth and the role of government in its achievement.[192]

For the United States, the FTAA provides lessons in both domestic and international trade politics. For one, international trade leadership depends upon first securing domestic support for the basic goals sought. While the FTAA negotiations can and will go ahead in the absence of the "touchstone" of United States approval

189. *See generally, WTO's Ruggiero Says New Trade Round Possible at Turn of Century*, AFX NEWS, May 26, 1998 (revealing support for a new trade round).

190. *See generally*, Heather Scoffield, *Turmoil Hinders Trade Agenda*, GLOBE & MAIL, Sept. 21, 1998, at B1 (examining the circumstances that hinder trade agenda).

191. *See id.*

192. For a brief introduction to this new consensus, *see* PAUL CRAIG ROBERTS & KAREN LAFOLLETTE ARAUJO, THE CAPITALIST REVOLUTION IN LATIN AMERICA (Oxford Univ. Press 1997).

for "fast track" negotiations with Chile, America's resolve for tariff reduction is being questioned.[193] In the context of the FTAA IPR negotiations, key concessions will not be made until that resolve is clarified.

Whether IPR is addressed in the FTAA or in a TRIPs II during a "Millennium Round," it will be addressed. The nations which have developed the capacity to negotiate the minutiae of IPR will have the best opportunity to assert their various interests.

II. IF HIGHER THAN TRIPS PROTECTION SHOULD BE NEGOTIATED IN THE FTAA, WHAT SHOULD BE THE LEVEL AND SCOPE?

NAFTA's Chapter Seventeen on IPR compels not only the discussion of IPR in the FTAA, but also in large part determines its content. That should not prove unduly burdensome because the NAFTA IPR provisions are not so dramatically different than TRIPs provides.

Chapter Seventeen closely follows that of the TRIPs negotiating text brought to the table in 1991 by Arthur Dunkel.[194] The compromise text ultimately adopted in TRIPS *in its scope* did not differ substantially from the Dunkel draft.[195] TRIPs differs from the Dunkel Draft mostly in its continuation of the numerous exception to national treatment obligations contained in the Paris[196] and Berne[197] Conventions.[198] In contrast, NAFTA only allows for a few, precisely detailed, exemptions from national treatment obligations.[199]

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193. *See* Scoffield, *supra* note 190.

194. *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. No. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter Dunkel Draft].

195. *Compare* Dunkel Draft, *supra* note 194 *with* TRIPs Agreement, *supra* note 5. The most substantial difference in scope between TRIPs and the Dunkel draft deals with performers, phonogram producers, and broadcasters for whom national treatment only applies to rights specified in TRIPs itself.

196. *See* Paris Convention, *supra* note 134.

197. *See* Berne Convention, *supra* note 134.

198. *See* TRIPs Agreement, *supra* note 5, at art. 3(1) & 3(2); *see also* Alexander A. Caviedes, *International Copyright Law: Should The European Union Dictate Its Development?*, 16 B.U. INT'L L.J. 165, 192-94 (1998).

199. *See* Allen Z. Hertz, *Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN-U.S.

The best known national treatment exemption in NAFTA is for Canada's cultural industries.[200] It is a suspect exemption.[201] Canadian commentators have shown repeatedly that the policy owes little to any nuanced or profound understanding of culture, Canadian or otherwise.[202] The absurdity of it all can be seen in the aftermath of the WTO ruling against the Canadian penalties levied on split-run magazines.[203] The government now proposes to restrict Canadian companies from advertising in American magazines sold in Canada.[204] At the same time, Canadian magazines which are sold in the United States, albeit in small numbers, are actively seeking advertising from American companies.[205] At the time of this writing, a pointless trade war remains a possibility. Both countries would lose by any economic or diplomatic yardstick.

NAFTA represents a landmark treaty both in its detailed de-

L.J. 261, 281-282 (1997) ("NAFTA . . . establishes a sweeping national treatment requirement[ ] which, [is] subject to a few specific exceptions . . . ."). For example, with respect to secondary use of sound recordings such as broadcasting or other public communication, NAFTA, art. 1703(1) states that a Party may limit the rights of another Party's performers to those rights its nationals are accorded in the territory of such other Party. *See* NAFTA, *supra* note 37, at 671, art. 1703.

200. *See* NAFTA, *supra* note 37, at 702, art.2106. The article refers to annex 2106, which states:

> Notwithstanding any other provision of this Agreement, as between the United States and Canada, any measure adopted or maintained with respect to cultural industries, except as, specifically provided in Article 302 (Market Access—Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed exclusively in accordance with the terms of the Canada-United States Free Trade Agreement. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

Id.

201. *See generally* Theresa A. Larrea, *Eliminate the Cultural Industries Exemption From NAFTA*, 37 SANTA CLARA L. REV. 1107 (1997) (arguing against the cultural industries exemption); Hale E. Hedley, *Canadian Cultural Policy and the NAFTA: Problems Facing The U.S. Copyright Industries*, 28 GEO. WASH. J. INT'L L. & ECON. 655 (1995)(discussing the effect of Canadian cultural policy on United States copyright industries).

202. *See* WILLIAM T. STANBURY, CANADIAN CONTENT REGULATIONS: THE INTRUSIVE STATE AT WORK (Fraser Inst. 1998).

203. *See* Peter Morton, *Ottawa Loads? Another Round in Magazine Wars*, THE FINANCIAL POST, July 25, 1998, at 1 (discussing the aftermath of the WTO ruling).

204. *See* John Urquhart, *Canada Seeks to Protect Its Magazines From Losing Ad Revenue to Foreigners*, WALL ST. J., July 30, 1998, at B12.

205. *See id.*

scription of IPR obligations and various dispute resolution mechanisms. Chapter Seventeen has four parts.[206] First, it sets forth general provisions on existing IP conventions, national treatment, and anti-competitive practices.[207] Second, it defines obligations regarding IP standards in the areas of copyrights, patents, trade secrets and industrial designs across a number of industries.[208] Third, it introduces obligations regarding enforcement measures, including access to civil courts, judicial review and interim injunctions, and requires that these do not become barriers to legitimate trade.[209] Fourth, it contains miscellaneous provisions, such as technical cooperation.[210]

As noted, NAFTA, excluding the exceptions to national treatment, closely resembles TRIPs.[211] One commentator notes, "The intellectual property provisions of the NAFTA were designed with the pending TRIPs agreement in mind. In most aspects TRIPS affords roughly the same protection for intellectual property as does the NAFTA."[212] Robert M. Sherwood and Carlos A. Primo Braga have detailed the list of NAFTA provisions which exceed the protections in TRIPs.[213]

As these issues are generally resolved in NAFTA, the FTAA IPR negotiations should move on to tackle thornier issues.

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206. *See* NAFTA, *supra* note 37, at 670-681, ch. 17.
207. *See id.* at 670-671, arts. 1701-1704.
208. *See id.* at 671-676, arts. 1705-1713.
209. *See id.* at 676-679, arts. 1714-1718.
210. *See id.* at 679, art. 1719.
211. *See supra* Part II.
212. *See* Schott, *supra* note 140, at 122.
213. Sherwood and Braga offer that:

> [M]ore precise and comprehensive treaty adherence requirements including UPOV adherence for new plant varieties, a more positive statement of national treatment, highly constrained transition periods, protection of encrypted satellite signals, narrower controls on abusive conditions, enhanced protection for software, databases, and sound recordings, enhanced contractual rights in copyright, tighter language regarding rental rights, extended minimum trademark terms, broader definition of the relevant public in determining whether trademarks are well known, tighter compulsory licensing constraints, disallowance of dependent patents, 'pipeline' protection, and reversal of the burden of proof for process patents. The treatment of patent exhaustion, sometimes called parallel imports, is not entirely clear cut but appears to be constrained.

Sherwood & Braga, *supra* note 178, §§ 3-4.

Sherwood and Braga identify a few key "tough issues" which the FTAA IPR negotiations could address.[214] These issues include Compulsory Licensing, Cultural Exemptions, "Pipeline" protections, Higher Life Forms, New Plant Varieties, Information Network Systems, Trade Secrets, Geographical Exhaustion of Rights, and a Hemispheric Intellectual Property Council.[215] If these issues were addressed, the possibility exists of devising not just a TRIPs Plus, but a NAFTA Plus agreement which could set the international standard for much of the next century.

Issues most in need of further resolution include the compensation mechanism for compulsory licensing and the definition of culture exemptions. In the complex area of pharmaceutical and life sciences patents, there are a number of specific issues to address.[216] These include guidelines for determining the trade in goods for which the patents has expired in one country, but not another. Another issue, albeit for the more developed countries in the hemisphere, is that of patent term restoration which allows companies to enjoy the full term of their patent protection by adding the time spent securing regulatory approval on to the life of the patent.[217] There are issues as to infringement exceptions for regulatory approval and for allowing generic competitors to stockpile products for release the moment the patent expires.[218]

A particularly controversial and important issue is that of data package protection.[219] This refers to the capability of companies to keep the data they submitted in order to receive regulatory approval exclusive for a longer period of time.[220] Access to data such as the results of human trials gives generic manufacturers a head

214. *See id.*

215. *See* David Lopez, *Dispute Resolution Under a Free Trade Area of the Americas: The Shape of Things to Come*, 28 U. MIAMI INTER-AM. L. REV. 597 (1997) [hereinafter Lopez I] (examining dispute resolution methods in the free trade area).

216. *See infra* notes 217-218.

217. *See Waxman/Hatch Act has not "lived up to its promise," PhRMA's Bantham Maintains*, THE PINK SHEET, Mar. 3, 1997, *available in* 1997 WL 16952088.

218. *See One Year Later, Canadian Patent Laws to Stay About the Same*, BIOTECHNOLOGY NEWSWATCH, Feb. 16, 1998, *available in* 1998 WL 8765022.

219. *See* Brian D. Coggio & Frances D. Cerrito, *Immunity for the Drug Approval Process, No Patent Infringement Under Certain Circumstances*, N.Y.L.J., Mar. 9, 1998, at S4.

220. *See id.*

start on preparing a product for market. Another contentious area is that of "linkage regulations," which allows patent holders to seek court orders to prevent the sale of a drug which appears to violate their patents.[221]

On the assumption that the highest standards of IPR protection could prove the most economically efficient, the FTAA negotiations should seek to achieve a level of IPR consistent with the protections offered in the United States, Canada, Europe, and Japan.

III. WHAT SPECIFIC ENFORCEMENT MECHANISMS SHOULD THE FTAA ADOPT TO ENSURE EFFECTIVE PROTECTION?

The question of the type of enforcement mechanism to negotiate into the FTAA has a slight air of unreality given the diverse quality of legal institutions among the participating countries. A country's ability to enforce IPR standards cannot be separated from its ability to enforce any law. The options are basically threefold: adopt one of the existing multilateral models such as those in MERCOSUR, NAFTA, or the WTO; start from scratch and build a new enforcement mechanism; or modify elements of existing models to best fit the circumstances.[222] Whatever the choice, countries will also have to give consideration to the interaction between the three identified existing mechanisms and other more specialized mechanisms such as investment protection treaties, including the stalled Multilateral Agreement on Investment ("MAI") and the "non-violation complaint alleging nullification or impairment of benefits."[223]

The first place to start is to suggest what should be the guiding principles. A discussion of guiding principles should address the following issues: legality versus informality, exclusively State to State actions versus a mixture of state and private rights of action, domestic versus bilateral or multilateral panels, confidentiality ver-

221. *See generally Canada's Linkage System "Is Unfair,"* MARKETLETTER, July 6, 1998, *available in* 1998 WL 11623102 (discussing Canada's linkage system).

222. *See* Lopez I, *supra* note 215, at 624.

223. Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U.J. INT'L L. & POL'Y 1015, §§ III, IV.A.2 (1997) (discussing MAI's).

sus openness, compensation versus removal of trade benefits, and permanent versus ad hoc enforcement institutions.

A. *Guiding Principles for Intellectual Property Protection*

1. Legality versus Informality

The NAFTA dispute resolution and enforcement mechanisms are highly legalistic, depending upon rules which emerge through carefully detailed procedures, rather than the "merits of the case."[224] Over time, one expects the procedures laid out in Chapter Twenty to become more precise.[225] This trend has a value in promoting transparency and certainty.

Given the diversity of legal institutions and legal cultures within the hemisphere, there is much merit in devising enforcement mechanisms which allow numerous opportunities for informal, negotiated solutions before disputes reach the stage of a binding panel ruling.[226] This entails recognition of the enforcement mechanisms employed in MERCOSUR, which rely upon informal political negotiations often at a very high level.[227] The downsides are the politicization of trade disputes in which the scarce time of executives can be wasted on relatively minor issues. Still, it is preferable to have negotiated rather than imposed enforcement. As countries become more accustomed to using international mechanisms, more legalistic forms could evolve.

The question becomes: "Can the model of the NAFTA dispute resolution and enforcement mechanisms be sufficiently modified to allow for opportunities for informality without sacrificing core transparency and certainty?" Company law provides some suggestions. For instance, there could be a defined period during which participants in a dispute could "opt out" of the dispute resolution

224. *See* David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 165, 207 (1997) [hereinafter Lopez II].

225. *See id.* at 208.

226. *See generally* Lopez II, *supra* note 224 (examining dispute resolution under NAFTA).

227. *See* Cherie O. Taylor, *Dispute Resolution As A Catalyst For Economic Integration And An Agent For Deepening Integration: NAFTA AND MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 853 (1996-1997) (addressing dispute resolution in Section II).

process to pursue informal settlement. If an accommodation could not be reached, the more formal rules would be triggered as a default.

The goal is to avoid unnecessary confrontations at times when countries are simply in a state too chaotic to comply. The example that springs to mind is the WTO rulings against India for its failure to pass complying legislation during a time of political crisis in 1995.[228]

2. Mixture of State and Private Actions versus Solely State Actions

A mixture of state and private rights of action, as exists in NAFTA, provides a greater scope and flexibility for dispute resolution.[229] State-to-state mechanisms tend to be complex and lengthy. They impose costs that may come close to exceeding the value of issue under dispute. Private/State dispute resolution procedures have the advantage of more closely mirroring the more familiar domestic court processes which allow for negotiated settlements at various points.[230] They also have the benefit of removing a great deal of the politics found in relatively minor disputes.[231]

The most important point here is that alleged violations of IPR almost always involve private companies.[232] To the extent that governments are taking up the cause of these companies, their expenditures represent a subsidy. While clearly governments have a role in protecting the interests of domestic companies in foreign

228. *See* Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R (Sept. 5, 1997).

229. *See* NAFTA, *supra* note 37, at 682, ch. 19; *see also* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 834-39, 887 (1995).

230. *See* Shell, *supra* note 229, at 889-890.

231. *Id.* at 837 (noting the desirability of removal of government influence from the realm of international trade); *see generally* Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 B.C. INT'L & COMP. L. REV. 1 (1998) (comparing NAFTA and European Union disciplines).

232. *See* Daniel F. Perez, *Exploitation and Enforcement of Intellectual Property Rights*, 10 COMPUTER LAWYER 10 (1993). A recent estimate by the United States International Trade Commission indicates that United States companies are incurring $40 to $60 billion per year due to violations of intellectual property rights.

markets, the costs should fall more on companies themselves.

3. Domestic versus Bilateral and Multilateral Resolution

In an ideal world, intellectual property disputes would be handled in the country where the alleged violations took place. One can too easily get trapped in the scholastic intricacies of these international dispute settlement mechanisms and forget that the vast majority of IPR disputes are settled within countries themselves, and rightly so.[233] It is the quality of domestic enforcement mechanisms which will best determine the effectiveness of any international IPR standards. Still the ideal supposes a lot, such as reasonably consistent domestic laws and well-functioning legal institutions.

On this count, the multilateral enforcement provided by TRIPs is problematic.[234] Despite detailed provisions outlining enforcement procedures, TRIPs includes a significant "escape clause." Paragraph 5 of Article 41 states that Part III, laying out the enforcement requirements:

> [D]oes not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in General. Nothing in this part creates any obligation with respect of the distribution of resources as between the enforcement of intellectual property rights and the enforcement of law in general.[235]

The clause admits that if a country's judicial system does not work very well, intellectual property disputes have no special claim to any better treatment than other disputes similarly caught

233. *See China: Courts Handle More IPR Lawsuits* (China Business Information Network, July 17, 1997).

234. *See* Kuo & Mossinghoff, *supra* note 67, at 539. TRIPs did provide the significant advance of placing IPR disputes within the ambit of WTO dispute settlement procedures. What must be noted here is the improvement of the new WTO procedures over the older GATT procedures. Specifically the new WTO procedures curtail the ability of defendant WTO members to block the adoption of WTO panel reports and to drag out decisions indefinitely. *See id.*

235. *See* TRIPs Agreement, *supra* note 5, at 1197.

in the morass of under-performing courts.[236] It would be narrow-minded to suggest that IPR disputes should have better treatment. The better course would be to say that the inevitability of increasing numbers of IPR disputes provides one more reason for nations to upgrade their judicial systems.

Attention to IPR in discussing judicial reform has a number of advantages. Bluntly put, as IPR disputes often involve great amounts of money, they attract attention.[237] Such attention may be necessary to jump start the hemispheric process of judicial reform. It is time to break out of the mold of hollow and formalistic initiatives which have yet to produce substantive changes. As Rick Messick of the World Bank notes that "[i]n the past five years or so the World Bank and the Inter-American Development Bank have either approved or initiated loans totaling over $300 million for judicial reform projects in some [twenty-five] countries . . . ."[238]

More importantly, a focus on IPR as property rights can bring to the foreground fundamental rights and "rule of law" issues.[239] The reform of IPR enforcement in domestic judicial systems would contribute to increasing the contractual efficiency identified earlier as a key to economic growth.

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236. *See id.*

237. *See* Perez, *supra* note 232, at 10.

238. Richard Messick, *Judicial Reform: A Survey of the Issues, in* WORLD BANK INTERNAL WORKING PAPERS(1997). Messick continues:

> New courts have been created, the number of judges increased, and computers and other modern technologies introduced. The codes controlling civil and criminal procedures have been streamlined, and the judicial sector has been reorganized to make it more independent. But, despite these changes, many systems still perform poorly.

Id.

239. *See generally* Laurence R. Helter, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy* 39 HARV. INT'L L.J. 357 (1998) (offering a proposal that would deepen the rights nature of IPRs).

4. Confidentiality versus Openness

William Landes and Richard Posner have argued that the courts in supplying judgments create a "public good."[240] The work of mediation and arbitration panels in defining and interpreting the underlying text of trade agreements provides an analogous service. The value of that information, however, is only as good as its dissemination.[241]

Information about court and panel decisions does more than just guide behavior and transactions; it is also a means to hold judges and tribunal members accountable. Jeremy Bentham once wrote:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and sheerest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity.[242]

The issue of openness has arisen between the United States and Canada involving disputes both in NAFTA and the WTO.[243] Two United States companies have recently challenged Canadian policy under NAFTA's Chapter Eleven on investments.[244] The hearings were held in strict secrecy.[245] The Canadian Trade Minister, Sergio

240. *See generally* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (arguing that the courts in supplying judgments create a "public good).

241. *See* Panel Discussion, *Transnational Litigation: International Arbitration and Alternatives, Opportunities and Pitfalls*, 10 AUT INT'L L. PRACTICUM 74, 84 (1997).

242. GERALD GALL, THE CANADIAN LEGAL SYSTEM 51 (4th ed. Carswell 1995).

243. *See generally* Scott Morrison & Edward Alden, *Ottawa Faces Claim Over PCB Waste Ban*, FIN. TIMES LTD. (London), Sept. 2, 1998, at 4 (detailing dispute); *see also*, J.-G. Castel, Q.C. & C.M. Gastle, *Deep Economic Integration Between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform*, 7 MINN. J. GLOBAL TRADE 1 (1998).

244. *See NAFTA Secrecy*, TORONTO STAR LTD., Aug. 27, 1998, at A27.

245. *See Why The Secrecy Over Investors' Rights?*, FIN. POST LTD., Aug. 29, 1998, at sec.1, 20.

Marchi, defended the secrecy as necessary to preserve commercial confidentiality.[246] He adopted a similar stance in response to a request from the United States Trade Representative, Charlene Barshefsky, to open up to the media the hearings of WTO dispute settlement panel addressing the issue of Canadian dairy exports.[247] As a Toronto *Globe and Mail* editorial correctly pointed out, "those are our tax dollars at stake and our laws that are on the stand. We have the right to learn the case against us."[248]

5. Compensation versus Removal of Trade Benefits

The penalties for violations of trade agreements boil down to two elements: (1) compensating the offended company or country or (2) removing the offender's trade benefits in the specific product area or in other areas as well, for example, cross retaliation. Though both NAFTA and TRIPs have adopted cross-retaliation, this is probably not a healthy trend.[249] Negotiating compensation provides a more economically efficient solution.[250] First it forces a country to deal squarely with the costs of its discriminatory behavior. Political leaders will have to publicly defend why they are using taxpayer dollars to defend the commercial advantages of certain industries. Second, it does not weaken the hard-fought advances in free trade. Third, it provides greater scope for variations in domestic policy as long as costs are acknowledged and compensated. At any rate, negotiations on potential compensation should come before the suspension of trade benefits. In the event that countries cannot agree on compensation, there still remains the alternative punishment of canceling trade preferences.

Particularly in the area of IPR, compensation provides an at-

246. *See NAFTA Secrecy*, *supra* note 244, at A27.

247. *See Settle Trade Disputes In The Open*, FIN. POST LTD., Sept. 11, 1998, § 1, at 10.

248. *"Can We Talk,"* GLOBE AND MAIL, Sept. 10, 1998, at A24.

249. It must also be noted that with IPR disputes subject to WTO jurisdiction, WIPO dispute settlement mechanisms are left in a weakened position because of their far weaker powers to compel resolution and to impose penalties. This must be interpreted as practically mooting the WIPO's promotion of the Draft Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property.

250. For a discussion of efficiency costs of negotiation over legal rules, *see* BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION 25 (1997).

tractive option. The nature of some knowledge-intensive products, such as pharmaceutical drugs, allows for a fairly reliable estimate of lost profits. For instance, if a domestic drug manufacturer violates a MNE's patent by selling copies of a drug, it is reasonably easy to uncover its sales records. In the case of a large number of enterprises copying records and films, though, it is not as straightforward an exercise.

The FTAA negotiators have the opportunity to bring compensation into the forefront of IPR dispute resolution. This could serve the purpose of resolving related disputes such as the scope of cultural exemptions.

6. Permanent versus Ad Hoc Enforcement Institutions

If the goal is to negotiate most disputes and, to an extent, negotiate enforcement, it is counter-productive to establish expensive permanent tribunals who will inevitably have an incentive to drum up cases and drag them out. NAFTA and the WTO cope well enough with ad hoc panels.[251] Moreover, as David Lopez suggests in arguing for evolutionary enforcement norms and procedure in the FTAA, a permanent institution is much more prone not to keep up with changing attitudes and capacities.[252]

B. *A Modified NAFTA Enforcement Mechanism Should Provide the FTAA Starting Point*

Given the diversity of countries in the hemisphere, simply adopting the WTO or NAFTA enforcement procedures would create too legalistic a mechanism to be immediately practical. As a result expediency gives reason to incorporate some informal nego-

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251. *See, e.g.*, John R. Schmertz, Jr. & Mike Meier, *U.S. Prevails Before WTO Panel in Dispute Over Argentina's Ad Valorem Import Tax and Duties*, 4 INT'L LAW UPDATE No 1', Jan. 1998 (detailing United States' victory); *see also* John R. Schmertz, Jr. & Mike Meier, *WTO Holds in Favor of U.S. in Trade Dispute with India Over Intellectual Property Rights*, 3 INT'L LAW UPDATE No 10 (Oct. 1997); John R. Schmertz, Jr. & Mike Meier, *Before Dispute Settlement Panel of WTO, U.S. Prevails Over Canada Regarding Its Imposition of Discriminatory Taxes and Postal Rates on U.S Magazine Imports*, 3 INT'L LAW UPDATE No. 4 (Apr. 1997).

252. *See* Lopez II *supra* note 224, at 208 (discussing dispute settlement in trade disputes of environmental and labor agreements.)

tiation avenues contained in MERCOSUR.[253] The basic framework provided by NAFTA, progressive stages ending in compulsory third-party arbitration for both State/State and Private/State disputes with a final ruling that can require a schedule of compliance, should be used as the starting point. As Boris Kozolchyk writes, "[i]n my opinion, NAFTA's model, and not that of supra-national federalism is more likely to become universally acceptable. In the grand scheme of international cooperative forces, NAFTA is the model most consistent with the nature of the modern nation state and with the limits of man's cooperative impulses."[254]

The starting point should be NAFTA, but with modifications. The modifications should seek to incorporate more openness, more openings for negotiation, and more opportunities for compensation-based remedies. The FTAA should also include a forward-looking statement as to the ultimate goal of resolving the majority of IPR disputes through domestic courts rather than through the ultra-national mechanisms provided for in trade agreements. Multilateral agency trade remedies should be extraordinary remedies. International trade agreements can only provide a limited substitute for the domestic entrenchment of the "rule of law."

C. *Two Complications with the NAFTA Model*

Though the NAFTA dispute resolution and enforcement mechanisms could provide a starting point for the FTAA negotiations, they also possess some complex and problematic features, specifically the investment dispute resolution mechanism[255] and the non-violation complaint.[256]

253. *See Why All the MERCOSUR Excitement?*, 4 MKT. LATIN AMER. No. 9 (Sept. 1, 1996).

254. *See* Lopez I, *supra* note 215, at 600 (quoting Boris Kozolchyk, *NAFTA In The Grand and Small Scheme of Things*, 13 ARIZ. J. INT'L & COMPETITION L., 135, 144 (1996)).

255. *See* JAMES H. CARTER, LITIGATING IN FOREIGN TERRITORY: ARBITRATION ALTERNATIVES AND ENFORCEMENT 19-26 (A.B.A. Center for Continuing Legal Education, A.B.A. 1998).

256. *See* Hertz, *supra* note 199, at 262.

1. Investment Protections

The FTAA presents the opportunity to make more explicit the connection in NAFTA between IPR and investment obligations.[257] The importance of doing so lies in the fact that the investment flows among the countries of the hemisphere may already exceed in dollar terms the volume of trade.

A landmark achievement of NAFTA was its Chapter Eleven on investment protection.[258] Indeed, Allen Z. Hertz writes that "As for NAFTA, none of its multiple personalities is more important than its character as a powerful investment protection instrument." [259] Still, it is little understood that Chapter Eleven treats IPR as "intangible property" and, therefore, falling under the definition of "investment."[260] By having IPR covered by Chapter Eleven, investors are afforded a new avenue of enforcement. According to Hertz, a former Canadian trade negotiator, in the case of an Investor/State dispute over a case of compulsory licensing, NAFTA provides that the merits of dispute would be heard by a Chapter Seventeen arbitration panel, but that the compensation to be paid in the case of a violation might be determined separately by a Chapter Eleven arbitration panel.[261]

As with any new wrinkle, NAFTA's linkage of IPR and investment has raised a number of difficult issues. These include: (1) what is the precise interaction between the trade and investment chapters, (2) what definitions should prevail in the case that Most Favored Nation ("MFN") status and "National Treatment" differs between sections, (3) what is the precise scope of the investment chapter's meaning of "expropriation" and, more importantly, "measures tantamount to expropriation," (4) how do the investment provisions in NAFTA affect other investment and IPR treaties, and (5) what affect do the investment provisions have on the possibility of compensation to be paid in trade areas where exemp-

257. *See Greater IP Protection Sought Within the FTAA*, 5 J. PROPRIETARY RTS. 24, 27 (1997).

258. *See* Hertz, *supra* note 199, at 262.

259. *See id.* at 295 (citation omitted).

260. *Id.*

261. Telephone interview with Allen Z. Hertz, former Canadian Trade Negotiator, Ottawa, Ontario (Aug. 10, 1998).

tions have been negotiated, such as Canada's cultural industries?[262]

If the FTAA process can help to bring some of these very difficult issues closer to resolution, then it will have achieved a great deal. Protection for intellectual property as investments will likely emerge in the next century as the preferred means to enforce rights. And, so it should.

It can be asked what benefit, aside from building negotiating knowledge and skills, would developing nations gain from wading through issues generated by NAFTA and left largely unresolved. For one, success in the FTAA could push the WTO to take over the MAI, a possibility made ever possible by the failure of the Organization for Economic Cooperation and Development ("OECD") to advance talks beyond the short-sighted efforts of the French and Canadian governments to restrict American 'cultural' industries.[263] Through the FTAA process, the developing nations of the Americas would prove that negotiating investment agreements does not, and should not, have to remain a rich nation's game. If the MAI is negotiated within the WTO, developing nations will gain a say, rather than face the option of agreeing or not agreeing to a text written by the twenty nine OECD nations who albeit control ninety eight percent of international FDI.[264] Indeed, the FTAA text could well serve as the basis for the MAI text.

2. Non-violation Complaints

The FTAA negotiations may also address some of the ambiguities of an emerging enforcement mechanism, the non-violation complaint. Allen Z. Hertz has described why this may be necessary, stating "the non-violation complaint alleging nullification or impairment of benefits, first fully elaborated under the General Agreement on Tariffs and Trade (GATT 1947) . . . [is] now incorporated in both NAFTA and the WTO Understanding on Rules and

262. *See* Hertz, *supra* note 199, at 295-307.

263. *See generally, A Survey of MERCOSUR*, ECONOMIST, Oct. 12, 1996 *available in* 1996 WL 11247186 (surveying MERCOSUR).

264. *See Does the WTO Need Special Rules for Foreign Direct Investment?*, ECONOMIST, Oct. 3, 1998, at 10; *see also, All Free Traders Now?*, ECONOMIST, Dec. 7, 1996, at 25, *available in* 1996 WL 11247482.

Procedures Governing the Settlement of Disputes."[265] There may be no avoiding dealing with the issue.

The non-violation nullification or impairment complaint refers to a right of action in a situation in which no explicit inconsistency or breach of obligations has occurred, but the plaintiff party asserts that an action by the defendant has upset the balance of concessions and benefits expected when the original trade agreement was signed.[266] In short, one party complains that even though no rule was broken, they are not receiving the benefits which enticed them to sign the agreement in the first place. As no inconsistency or breach has occurred, the plaintiff cannot request that the defendant remove the offending measure.[267] Instead, through a WTO panel, the plaintiff seeks compensation in order to restore the original trade-off of benefits and concessions.[268]

The non-violation process presents a powerful tool for both nations and private parties to enforce IPR against the constantly novel ways to circumvent them. It does stress compensation over removal of trade benefits. However, if not properly defined, the non-violation complaint could lead to abuses for which the blame would fall incorrectly on the standard of IPR protection rather than the vagaries of the enforcement mechanism.

NAFTA applies the non-violation complaint to Chapter Seventeen on intellectual property.[269] Though there are exceptions, a party could access NAFTA's State\State dispute settlement mechanism in order to determine whether another party had initiated a novel measure which, while not inconsistent with NAFTA, nullified or impaired a benefit expected under Chapter Seventeen. Potential actions that could trigger a non-violation complaint include new laws on cigarette packaging, domestic content in broadcasting, and reference-based pricing for pharmaceutical drugs.[270]

265. *See* Hertz, *supra* note 199, at 262.

266. *See id.* at 285-86.

267. *Id.*

268. *See id.*

269. *See* Linda E. Prudhomme, *The Margarita War: Does the Popular Mixed Drink "Margarita" Qualify as Intellectual Property?*, 4 SW. U.J.L. & TRADE AM. 109, 133 (1997).

270. *See* Hertz, *supra* note 199, at 292.

Canada agreed to having non-violation complaints apply to IPR out of the belief that it had secured sufficient exemptions, in particular cultural industries, to sufficiently reduce the risk that they would ever be invoked.[271] Time and self-interest, of course, prove remarkable inspirations for innovation.

That Canada agreed to have the non-violation complaint in NAFTA surprised observers because it had opposed the American effort to place it in TRIPs.[272] A compromise position was only found in the dying days of the TRIPs negotiations.[273] It allowed that non-violation complaints could not be initiated before January 1, 2000.[274] The TRIPs Council is now examining recommendations for using the non-violation complaint which will be sent to the WTO Ministerial Conference who can either approve its use or order more study.[275] If the WTO ministers cannot reach a consensus, then the non-violation complaint will apply to TRIPs disputes on January 1, 2000.[276]

One challenge for the FTAA negotiators is to define what constitutes a "benefit" which a non-violation complaint alleges has been lost.[277] If the definition of "benefits" is too narrow, then the non-violation complaint procedure would not be effective. If it is too broad, then the danger exists that any government action could trigger an attempt to secure those benefits through legal means less risky than the vicissitudes of the market. Some definition of "benefit" must exist which allows IPR-holders to use non-violation complaints to protect their market opportunities, but does not at the same time invite speculative litigation. Finally, there must be some scope for government legislation and regulation that does not trigger trade actions. Without a workable and sensible definition of "benefits," whether by the FTAA, TRIPs, or the WTO, the exercise of the non-violation complaints could provoke an undeserved backlash against high standards of IPR. The accusation would be

271. *See id.* at 287.
272. *See id.* at 287-88.
273. *See id.* at 287.
274. *See id.*
275. *See id.*
276. *See id.*
277. *See id.* at 294.

that such standards had led to an unintended loss of sovereignty.

Frankly, whether the FTAA can competently deal with the non-violation complaint issue remains a question.

CONCLUSION

This Article has sought to answer three questions. The answers to each can be summarized as follows. First, the FTAA should negotiate a higher than TRIPS level of IPR protection. Both developed and developing nations will benefit from the resulting further entrenchment of property rights, the expansion of free trade, the shaping of a global optimal standard, and the settling of the intellectual property debate at least in the short-term.

Second, the IPR protections in NAFTA provide the starting point for the FTAA IPR negotiations. Negotiators should then go further to address the tough issues including patent term restoration and data exclusivity. Even though some technologies, such as biotechnology and commercial databases, and some issues, such as compensation for compulsory licensing, may not yield a consensus, the effort to reach one will build knowledge and skills among negotiators and clarify the conflicting interests.

Lastly, the enforcement mechanism for IPR contained in the FTAA should start with the basic model of NAFTA and should incorporate features from MERCOSUR through the use of "default rules" to provide for more openness, opportunities for negotiation and the use of compensation rather than removal of trade benefits. The FTAA should proceed to define investment protections and non-violation complaints. More optimistically, the FTAA should provide an impetus to the reform of domestic judicial and administrative institutions to minimize the need to resort to ultra-national procedures.

To the first question, then, one may ask whether the FTAA is being used by American trade negotiators, acting largely for the benefit of the American pharmaceutical, software and entertainment industries, to advance in a more manageable regional forum those IPR standards which they failed to secure in TRIPs and to negotiate an accelerated implementation of TRIPs and possibly a TRIPs Plus in key hemispheric markets? The answer is: yes, but

developing countries will gain considerable benefits in new trade and investment opportunities.

Though self-interest may drive the American position on IPR, there is no harm if the result increases economic efficiency through the clearer definition and stronger enforcement of property rights. The harms alleged to higher IPR standards are now being shown to be, for the most part, either theoretical or short-term transition problems. An empirical record is accumulating which shows more clearly the benefits when developing countries adopt higher IPR standards. Ultimately, property rights draw a line between who allocates scarce resources, the state or the individual, in a competitive market. The heavier the line is drawn, the greater the restraint upon state opportunism and favoritism. The more clearly the line is recognized, the greater the ability of the individual to pursue the economic opportunities borne out of their own labor, talent and invention.